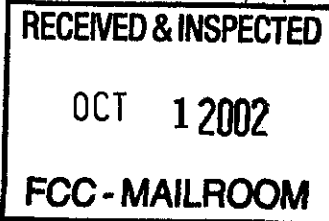


Federal Communications Commission

FCC 02-262

Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
Application by Verizon New England Inc.,)
Verizon Delaware Inc., Bell Atlantic) WC Docket No. 02 - 157
Communications, Inc. (d/b/a Verizon Long)
Distance), NYNEX Long Distance Company)
(d/b/a Verizon Enterprise Solutions), Verizon)
Global Networks Inc., and Verizon Select)
Services Inc., for Authorization To Provide)
In-Region, InterLATA Services in New)
Hampshire and Delaware)

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2002

Released: September 25, 2002

By the Commission: Chairman Powell issuing a statement; Commissioners Copps and Martin
approving in part, concurring in part, and issuing separate statements.

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I. INTRODUCTION

1. On June 27, 2002, Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. (Verizon), jointly filed this application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA services originating in the states of New Hampshire and Delaware. We grant the application in this Order based on our conclusion that Verizon has taken the statutorily-required steps to open its local exchange markets to competition in New Hampshire and Delaware.²

2. According to Verizon, competing carriers serve approximately 144,500 lines in New Hampshire and approximately 49,300 lines in Delaware using all three entry paths available

¹ We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. See 47 U.S.C. §§ 151 *et. seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² See 47 U.S.C. § 271.

under the Act (resale, unbundled network elements, and competitor-owned facilities).³ Across each state, competitors serve approximately 34,000 lines in New Hampshire and approximately 13,400 lines in Delaware through resale. Competitors using unbundled network elements or their own facilities serve approximately 110,500 lines in New Hampshire and approximately 35,900 lines in Delaware.⁴

3. We wish to acknowledge the effort and dedication of the New Hampshire Public Utilities Commission (New Hampshire Commission) and the Delaware Public Service Commission (Delaware Commission) which have expended significant time and effort overseeing Verizon's implementation of the requirements of section 271 of the Act. By diligently and actively conducting proceedings to set UNE prices, to implement performance measures, to develop Performance Assurance Plans (PAPs), and to evaluate Verizon's compliance with section 271 of the Act, the New Hampshire and Delaware Commissions laid the necessary foundation for our review and approval. We are confident that the New Hampshire and Delaware Commissions' efforts, culminating in the grant of this application, will reward New Hampshire and Delaware consumers by making increased competition in all markets for telecommunications services possible in these states.

II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies (BOCs) demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service. Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the Attorney General.⁵ We rely heavily in our examination of this application on the work completed by the Delaware and New Hampshire Commissions as well as the U.S. Department of Justice.

³ See Verizon Application Appen. A, Vol. 5, Tab I, Declaration of John A. Torre (Verizon Torre Decl.) Attach. 1, 2 at paras. 3-4. As a percentage of total lines, competitive LECs serve approximately 7.7 percent of all lines in Verizon's service area in Delaware and 16.2 percent of all lines in Verizon's service area in New Hampshire. See Department of Justice Evaluation at 5, 8.

⁴ See Verizon Torre Decl. Attach. 1, 2 at para. 4.

⁵ The Commission has summarized the relevant statutory framework in prior orders. See, e.g., *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) (*Bell Atlantic New York Order*).

5. *New Hampshire.* On July 31, 2001, Verizon formally asked the New Hampshire Commission to consider whether Verizon is complying with the requirements of section 271.⁶ The New Hampshire Commission opened a docket to consider Verizon's request, and conducted an evaluation of Verizon's compliance with section 271.⁷ The New Hampshire Commission accepted comments, declarations, exhibits, and briefs from all interested parties. The New Hampshire Commission also appointed a facilitator who conducted an investigation that included extensive discovery, technical conferences, and five days of evidentiary hearings.⁸

6. On completion of its proceeding, the New Hampshire Commission sent a letter to Verizon expressing its conclusion that Verizon met the requirements needed for section 271 approval except for checklist items 1 (interconnection), 2 (unbundled network elements), 4 (unbundled local loops), 5 (unbundled local transport) and 13 (reciprocal compensation).⁹ In that letter the New Hampshire Commission stated that its recommendation for Verizon's 271 approval in New Hampshire was conditioned on Verizon's taking several actions.¹⁰ Verizon

⁶ See *Application by Verizon New England, Inc., Verizon Delaware Inc. et al., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Consultative Comments of the New Hampshire Public Utilities Commission on Verizon New Hampshire's Compliance with Section 271 of the Telecommunications Act of 1996 (New Hampshire Commission Comments) at 3.

⁷ Specifically, the New Hampshire Commission initiated Docket No. DT 01-151. *Id.*

⁸ *Id.* at 2-3.

⁹ See Letter from New Hampshire Public Utilities Commission to J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, DT 01-151 at 2 (filed March 1, 2002) (New Hampshire Commission March 1 Letter).

¹⁰ See *id.* at 2-4. The New Hampshire Commission set forth the following conditions: (1) explicitly convert the existing statement of generally available terms and conditions (SGAT) into a competitive LEC tariff from which competitors may order anything contained in the SGAT without the need to negotiate or amend an interconnection agreement; (2) recalculate the rates in the competitive LEC tariff, using an 8.42 percent overall cost of capital, based on Verizon's current debt to equity ratio, Verizon's current cost of debt and 10 percent return on equity as used in New Jersey; (3) revise the SGAT and competitive LEC tariff to apply the unbundled local switching charge only once to a call that originates and terminates at the same switch; (4) revise the SGAT and competitive LEC tariff to clarify that UNE-P combinations commonly combined with Verizon to serve retail customers will be provided, as in Massachusetts, even if the particular loop and switch port affected by the competitive LEC order are not currently connected and have not previously been connected to each other; (5) create a competitive LEC-only intrastate special access tariff for DS-1 and DS-3 using UNE rates and SGAT terms and conditions and include a provision allowing competitive LECs to either connect a UNE to the special access or charge \$1.00 for the special access until it is converted to a UNE; (6) create a category for customers that have critical needs (*i.e.*, fire, hospital, police), which identifies the end-user customers requiring continued phone service for purposes of public health and safety; (7) create a rapid response process similar to the process being developed by Maine that will address issues in dispute between Verizon and competitive LECs in an expedited manner; (8) convert all interim number portability to permanent number portability; (9) refund or recalculate disputed DC power bills that were rated using the intrastate SGAT rate in effect by operation of law prior to the Commission's final order on DC power (Order No. 23,915); and (10) require employees in contact with competitive LECs to identify themselves either using an employee identification number or first name and last name. *Id.*

agreed to comply with six out of the ten conditions subject to certain conditions and understandings.¹¹ With regard to the remaining conditions, Verizon believed, among other things, that it did not need to comply with the requested changes in order to obtain section 271 approval.¹² Verizon also suggested that the New Hampshire Commission adopt, without condition, Verizon's PAP when evaluating Verizon's section 271 application.¹³ On May 24, 2002, the New Hampshire Commission completed an examination of Verizon-New Hampshire's proposed C2C guidelines and PAP, modeled on the performance enforcement mechanisms approved by the New York and Massachusetts Commissions.¹⁴ On June 13, 2002, the New Hampshire Commission completed an expedited review of Verizon-New Hampshire's pricing of unbundled network elements.¹⁵ In a letter dated June 14, 2002, after removing two conditions and accepting Verizon's proposed alternative approaches for the other two conditions, the New Hampshire Commission determined that Verizon had met the 14-point checklist and that its entrance into the interLATA toll market served the public interest.¹⁶ In this proceeding, the New Hampshire Commission filed its consultative comments recommending that we approve Verizon's application subject to the conditions set forth in the New Hampshire June 14 Letter.¹⁷

7. *Delaware.* Beginning in 1997, the Delaware Commission conducted a series of pricing proceedings to set the rates for unbundled network elements.¹⁸ In addition, on June 25,

¹¹ See Letter from J. Michael Hickey, President, Verizon New Hampshire, to the New Hampshire Public Utilities Commission at 2-7 (Mar. 18, 2002) (Verizon Mar. 4 Letter). In particular, Verizon agreed to comply with conditions 1, 4, 6, 7, 8, and 10. See *id.*

¹² *Id.* at 3-6. See also Letter from the New Hampshire Public Utilities Commission to J. Michael Hickey, President, Verizon New Hampshire, *Application of Verizon New England, Inc., d/b/a Verizon New Hampshire, for a Favorable Recommendation to Offer InterLATA Service Under 47 U.S.C. 271, DT 01-151* at 1-2 (Apr. 10, 2002) (directing New Hampshire Commission staff and parties to provide clarifications, modifications or substitutions to conditions 2, 3, 5, and 9 that would better serve the interests of the parties and public) (New Hampshire Commission Apr. 10 Letter).

¹³ *Id.* at 7.

¹⁴ See New Hampshire Commission Comments at 6, 18.

¹⁵ *Id.* On June 15, 2002, Verizon-New Hampshire appealed to the New Hampshire Supreme Court certain portions of the New Hampshire Commission's decision on pricing of unbundled network elements; as part of its appeal, Verizon-New Hampshire requested a stay of portions of the order. *Id.*

¹⁶ See Letter from the New Hampshire Public Utilities Commission to J. Michael Hickey, President, Verizon New Hampshire, *Application of Verizon New England, Inc., d/b/a Verizon New Hampshire, for a Favorable Recommendation to Offer InterLATA Service Under 47 U.S.C. 271, DT 01-151* at 3-4 (June 14, 2002) (New Hampshire Commission June 14 Letter). In particular, the New Hampshire Commission removed conditions 3 and 9, and accepted Verizon's alternative proposals to conditions 2 and 5. *Id.*

¹⁷ New Hampshire Commission Comments at 2.

¹⁸ See *Application by Verizon New England, Inc., Verizon Delaware Inc. et al., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Consultative Comments of the Public Service Commission of Delaware (July 16, 2002) (Delaware Commission Comments) at 10.

2002, the Delaware Commission approved performance metrics and standards for Verizon-Delaware based on the carrier-to-carrier (“C2C”) guidelines adopted by the New York Public Service Commission in October 2001, as amended in April 2002.¹⁹ Finally, the Delaware Commission adopted a “consensus” PAP to monitor Verizon-Delaware wholesale performance and encourage Verizon-Delaware to continue to meet its obligations under section 251 of the Act.²⁰

8. On February 1, 2002, Verizon formally asked the Delaware Commission to consider whether Verizon is complying with the requirements of section 271.²¹ The Delaware Commission opened a docket to consider Verizon’s request, and conducted an evaluation of Verizon’s compliance with section 271.²² The Delaware Commission accepted written testimony from all interested parties, and conducted two days of hearings.²³ On completion of its proceeding, the hearing examiner, appointed by the Delaware Commission, found that Verizon had adequately demonstrated compliance with Track A, the checklist requirements, and the public interest requirements of section 271, “on the condition that Verizon-D[elaware] makes . . . assurances and verifications . . . regarding interconnection points, its wholesale billing system, and future changes to its course of dealings with CLECs under its interconnection agreements.”²⁴ On July 16, 2002, the Delaware Commission filed its consultative comments recommending that the Commission approve Verizon’s application.²⁵ The Delaware Commission, satisfied with Verizon’s response to the conditions set forth by the hearing examiner, found that the record “supports findings that Verizon-D[elaware] has met the requirements of 47 U.S.C. § 271(c)” and “does not reveal . . . the existence of any exceptional facts or circumstances that would frustrate the congressional intent that local exchange markets in Delaware be open to competitive entry.”²⁶

9. The Department of Justice filed its recommendation on August 1, 2002, concluding that “Verizon has generally succeeded in opening its local markets in Delaware and New Hampshire to competition.”²⁷ Accordingly, the Department of Justice recommends

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ See *In the Matter of the Inquiry Into Verizon Delaware, Inc.’s Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c)*, PSC Docket No. 02-001 at 2 (June 3, 2002) (*Delaware Commission Order*).

²² See generally *Delaware Commission Order*.

²³ See *id.* at 3.

²⁴ See *Delaware Commission Order* at 42.

²⁵ See *Delaware Commission Comments* at 31.

²⁶ *Id.* at 31-32.

²⁷ Department of Justice Evaluation at 2. Section 271(d)(2)(A) requires us to give “substantial weight” to the Department of Justice’s evaluation. 47 U.S.C. § 271(d)(2)(A).

approval of Verizon's application for section 271 authority in New Hampshire and Delaware, stating that:

Although there is significantly less competition to serve residential customers via facilities and to serve both business and residential customers via the UNE-platform, the Department does not believe that there remain any material non-price obstacles to competition in Delaware created by Verizon. Verizon has submitted evidence to show that its OSS in Delaware are the same as those that the Commission found satisfactory in Pennsylvania. Moreover . . . the Department does not believe that there remain any material non-price obstacles to competition in New Hampshire created by Verizon. Verizon has submitted evidence to show that its OSS in New Hampshire are the same as those that the Commission found satisfactory in Massachusetts. Moreover, there have been few complaints regarding Verizon's New Hampshire OSS in this proceeding.²⁸

10. The Department of Justice notes that there were "complaints from commenters regarding . . . UNE rates in New Hampshire and urges the Commission to look carefully at these comments in determining whether Verizon's prices are cost-based."²⁹ The Department of Justice also notes that there were "complaints filed by commenters regarding UNE rates in Delaware, and urges the Commission to examine these comments carefully in determining whether Verizon's prices are cost-based."³⁰

11. *Complete-as-Filed Rule.* As set forth in the Commission's rules, an applicant is expected to demonstrate in its application that it complies with section 271 as of the date of filing.³¹ Here, however, Verizon lowered its feature change charge on day 46, and its switching usage rate on day 64, of the 90-day review period. In such cases, the Commission reserves the right to re-start the 90-day review period anew or to accord such information no weight in determining section 271 compliance.³² This rule provides interested parties with a fair

²⁸ *Id.* at 7, 9-10.

²⁹ *Id.* at 10.

³⁰ *Id.* at 7.

³¹ See *Updated Filing Requirements for Bell Operating Company Applications under Section 271 of the Communications Act*, CCB, Public Notice, DA 01-734 (Mar. 23, 2001).

³² See *id.* See also *Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, Memorandum Opinion and Order, 17 FCC Rcd 3300, 3306, para. 8 (2002) (*Verizon Rhode Island Order*); *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

opportunity to comment on the BOC's application, ensures that the Department of Justice and the state commission can fulfill their statutory consultative roles, and affords the Commission adequate time to evaluate the record.³³ The Commission can waive its procedural rules, however, if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."³⁴ We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules³⁵ to the limited extent necessary to consider Verizon's voluntary rate reductions filed during the course of this proceeding.

12. As we have stated, Verizon filed two rate reductions subsequent to filing its application. On August 12, 2002, Verizon filed a new feature change non-recurring charge of \$5.98, reduced from \$9.01, to correct its failure to comply with the Delaware Commission's order to use shorter work times for feature change tasks compiled by an independent consultant, rather than Verizon's internal, longer work time estimates.³⁶ On August 30, 2002, Verizon voluntarily filed new, reduced switching rates.³⁷ In filing its reduced switching rates, Verizon explained that, while it considered its original, Phase I switching rates to be TELRIC compliant, it was voluntarily reducing its rates "to eliminate any possible argument that these rates exceed the TELRIC range."³⁸ Verizon notified all competitive LECs operating in Delaware via electronic mail of the rate change immediately upon filing with the Delaware Commission.³⁹

13. Verizon asserts that the new, reduced switching rate became effective immediately,⁴⁰ while AT&T asserts that the new switching rate cannot become effective without action by the Delaware Commission, including advance notice and a hearing if one is

³³ *Verizon Rhode Island Order*, 17 FCC Rcd at 3305-06, para. 7; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543, 20572-73, paras. 52-54 (2002) (*Ameritech Michigan Order*).

³⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). See also 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

³⁵ 47 C.F.R. § 1.3.

³⁶ Letter from Richard T. Ellis, Director, Federal Affairs, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Aug. 12, 2002) (Verizon Aug. 12 *Ex Parte* Letter). See also discussion of Verizon's feature change charge at section III.B.3.d, *infra*.

³⁷ Letter from Richard T. Ellis, Director, Federal Affairs, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Aug. 30, 2002) (Verizon Aug. 30 *Ex Parte* Letter). See also discussion of Verizon's switching rates at section III.B.3.b, *infra*.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* See also Letters from Richard T. Ellis, Director, Federal Affairs, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Sept. 9, Sept 13, and Sept. 20, 2002) (Verizon Sept. 9, Sept. 13, and Sept. 20 *Ex Parte* Letters).

requested.⁴¹ The Delaware Commission resolved this dispute at a meeting on September 10, 2002, that AT&T did not attend. Despite AT&T's assertions to the contrary, the transcript of that meeting demonstrates the Delaware Commission's understanding that, by doing nothing, it was allowing Verizon's reduced switching rate to take effect.⁴² Indeed, the Delaware Commission has posted Verizon's reduced switching rate, indicating that it is available to all competitive LECs in Delaware.⁴³ We see no reason to disturb the Delaware Commission's decision, which relied in part on interpretations of Delaware law. We also reject AT&T's claim that Verizon's application must fail because AT&T has not agreed to the switching rate reduction and there is no indication that other CLECs have consented to the reduction.⁴⁴ Finally, AT&T's insistence that we consider only Verizon's higher, Phase I rates in this proceeding ignores Commission precedent. In the *SWBT Kansas/Oklahoma Order*, the Commission stated: "Consideration of rates that are higher than what competitors need actually pay is unreasonable under the circumstances [of a voluntary rate reduction.]"⁴⁵

14. The concerns the Commission has expressed in prior section 271 applications regarding rate changes filed after the deadline for comments in a section 271 proceeding are absent here. Verizon's rate reductions provide a pro-competitive response to commenters' stated concerns and desires. As discussed more fully at section III.B.3.b, *infra*, Verizon's reduced switching rates cause its non-loop rates, which include switching rates, to pass a benchmark comparison to its New York non-loop rates. This result is precisely the action that WorldCom

⁴¹ Supplemental Comments of AT&T Corp. at 2-3; Letter from David M. Levy, Counsel for AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 3-4 (filed Sept. 16, 2002); Letter from Amy Alvarez, District Manager, Federal Government Affairs, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Sept. 24, 2002).

⁴² Delaware PSC, *Application of Verizon Delaware Inc. (F/K/A Bell Atlantic-Delaware, Inc.), for approval of its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Phase II*, Hearing Transcript at 2469-70, 2475-78, 2484, Docket No. 96-324, (Sept. 10, 2002). See also Verizon Sept. 20 *Ex Parte* Letter.

⁴³ Delaware PSC (last visited Sept. 24, 2002) http://www.state.de.us/delpsc/major/jac_8_30_ltr.pdf (posting letter from Julia Conover, Vice President and General Counsel, Delaware, Verizon, to Karen Nickerson, Secretary, Delaware Public Service Commission, stating: "These new rates will be applicable to all [competitive] LECs operating in Delaware and shall remain in effect until the [Delaware] Commission otherwise modifies the rates."). See also Verizon Aug. 30 *Ex Parte* Letter.

⁴⁴ AT&T Sept. 16 *Ex Parte* Letter at 4. We discuss AT&T's claim that the reduced rate is not TELRIC compliant at section III.B.3.b, *infra*.

⁴⁵ *SWBT Kansas Oklahoma Order*, 16 FCC Rcd at 6269-70, para. 66. See also *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20748, para. 61 (2001) (*SWBT Arkansas/Missouri Order*).

told us to require of Verizon before granting section 271 approval in Delaware.⁴⁶ Verizon also discovered that it had miscalculated its feature change non-recurring charge, contested by AT&T in this proceeding,⁴⁷ and reduced it from \$9.01 to \$5.98. Each of these changes responded to arguments advanced by the parties to this proceeding or, in the case of the feature change charge, to a Delaware Commission mandate, and resulted in reduced prices for UNEs. These rate reductions will promote local competition in Delaware, and are in the public interest. Thus, consistent with our prior orders, we will consider these new, lower rates without requiring Verizon to re-file its section 271 application.⁴⁸

15. We also find that interested parties and the Commission have had adequate opportunity to review the new rates. Verizon filed the feature change charge reduction on the 46th of the 90 days permitted for review of its application, and the switching rate reduction on the 64th day of the permitted 90 days. Verizon's rate changes are limited to one non-recurring charge and the switching usage rate, and analyzing their effect on Verizon's Delaware section 271 application is not unduly complex.⁴⁹ Therefore, we conclude that interested parties have had sufficient time to analyze Verizon's rate reductions.

16. Lastly, we find that Verizon has not attempted to "game" the section 271 process by maintaining artificially high rates until the final hour before obtaining section 271 approval.⁵⁰ Both the Delaware Commission and a federal district court had found Verizon's Phase I switching rates in effect when Verizon filed this application to be fully TELRIC compliant. No party to this proceeding claims that the process or inputs used to derive the Phase I rates failed to comply with TELRIC principles when the Delaware Commission adopted the Phase I rates. Instead, AT&T and WorldCom claim that changes in inputs to Verizon's cost studies over time since the Delaware Commission adopted the rates causes the rates to fall outside a reasonable

⁴⁶ WorldCom Comments at 3-4; WorldCom Comments, Declaration of Chris Frentrup on Behalf of WorldCom, Inc. at 4, para. 8 (WorldCom Frentrup Decl.). See also *Verizon Rhode Island Order*, 17 FCC Rcd at 3309, para. 14, where AT&T urged the Commission to require Verizon to reduce its Rhode Island switching rates so that Verizon's Rhode Island non-loop rates would pass a benchmark comparison with New York non-loop rates.

⁴⁷ AT&T Comments, Tab D, Declaration of Richard J. Walsh on Behalf of AT&T Corp. at para. 39 (AT&T Walsh Decl.).

⁴⁸ *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247-50, paras. 22-27; *Verizon Rhode Island Order*, 17 FCC Rcd at 3305-10, paras. 7-17. See also Verizon Sept. 20 *Ex Parte* Letter.

⁴⁹ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6248-49, para. 23; *Verizon Rhode Island Order*, 17 FCC Rcd at 3308, 3310, paras. 10-11, 16. See also Verizon Sept. 20 *Ex Parte* Letter.

⁵⁰ See *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd 6250, para. 27; *Verizon Rhode Island Order*, 17 FCC Rcd at 3309, para. 15.

TELRIC range.⁵¹ As Verizon explained, it filed the new, reduced rates in response to such claims.⁵² Thus, we conclude that Verizon has not attempted to game the section 271 process.

III. PRIMARY ISSUES IN DISPUTE

17. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish compliance with every checklist item. Rather, we rely on the legal and analytical precedent established in prior section 271 orders, and we attach comprehensive appendices containing performance data and the statutory framework for evaluating section 271 applications.⁵³ Our conclusions in this Order are based on performance data as reported in carrier-to-carrier reports reflecting service in the most recent months before filing (February through June 2002).⁵⁴

18. We focus in this Order on the issues in controversy in the record. Accordingly, we begin by addressing whether the application qualifies for consideration under section 271(c)(1)(A) (Track A), and checklist items 2 (unbundled network elements, or UNEs) and 4 (unbundled local loops). The remaining checklist items are discussed briefly. We find, based on our review of the evidence in the record, that Verizon satisfies all the checklist requirements for New Hampshire and Delaware.⁵⁵

⁵¹ AT&T Comments at 9-11; AT&T Comments, Tab A, Declaration of Michael Lieberman on Behalf of AT&T at 8 (AT&T Lieberman Decl.); WorldCom Comments at 3; WorldCom Frentrup Dec. at 4, para. 7.

⁵² Verizon Aug. 30 *Ex Parte* Letter.

⁵³ Appendices D (Delaware Performance Data), E (Pennsylvania Performance Data), B (New Hampshire Performance Data), C (Massachusetts Performance Data), and F (Statutory Requirements); see *Verizon Rhode Island Order*, 17 FCC Rcd 3300, Appens. B, C, and D; *SWBT Arkansas/Missouri Order*, 16 FCC Rcd 20719, Appens. B, C, and D; *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17508-45, Appens. B and C (2001) (*Verizon Pennsylvania Order*).

⁵⁴ We examine data through June 2002 because it covers performance that occurred before comments were due in this proceeding on July 17, 2002. See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18372, para. 39 (2000) (*SWBT Texas Order*).

⁵⁵ We note that the United States Court of Appeals for the District of Columbia Circuit recently opined in two relevant Commission decisions, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Doc. No. 98-147 and Fourth Report and Order in CC Doc. No. 96-98, 14 FCC Rcd 209 (1999) (*Line Sharing Order*). *USTA v. FCC*, 290 F.3d 415 (D. C. Cir. 2002), petition for rehearing and suggestion for rehearing en banc denied Sept. 4, 2002. The court's decision addressed both our UNE rules and our line sharing rules. The Commission is currently reviewing its unbundled network elements rules as part of our *Triennial UNE Review and* (continued....)

A. Compliance With Section 271(c)(1)(A)

19. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, the BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).⁵⁶ To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."⁵⁷ In addition, the Act states that "such telephone exchange service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."⁵⁸ The Commission has concluded that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers,⁵⁹ and that unbundled network elements are a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A).⁶⁰ The Commission has further held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"⁶¹ which a BOC can do by demonstrating that the

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NPRM. See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22805, paras. 53-54 (*Triennial UNE Review NPRM*), and recently extended the reply comment date to allow parties to incorporate their review and analysis of the D.C. Circuit's recent decision. *Wireline Competition Bureau Extends Reply Comment Deadline for Wireline Broadband and Triennial Review Proceedings*, Public Notice, DA 02-1284 (May 29, 2002). Further, the court stated that "the Line Sharing Order must be vacated and remanded." *USTA v. FCC*, 290 F.3d at 429. The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the Line Sharing Order and the [UNE Remand Order] to the Commission for further consideration in accordance with the principles outlined." *Id.* at 430. On September 4, 2002, the court denied petitions for rehearing filed by the Commission and others. *See USTA v. FCC*, Order, Nos. 00-1012 and 00-1015 (D.C. Cir. filed Sept. 4, 2002).

⁵⁶ 47 U.S.C. § 271(c)(1).

⁵⁷ 47 U.S.C. § 271(c)(1)(A).

⁵⁸ *Id.*

⁵⁹ *Ameritech Michigan Order*, 12 FCC Rcd 20543, 20589, para. 85; *see also Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20633-35, paras. 46-48 (1998) (*BellSouth Louisiana Order*).

⁶⁰ *Ameritech Michigan Order*, 12 FCC Rcd at 20598, para. 101.

⁶¹ *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8694-95, para. 14 (1997) (*SWBT Oklahoma Order*).

provider serves “more than a *de minimis* number” of subscribers.⁶² Track A does not require any particular level of market penetration.⁶³

20. We conclude, as did the New Hampshire and Delaware Commissions, that Verizon satisfies the requirements of Track A in New Hampshire⁶⁴ and Delaware.⁶⁵ In New Hampshire, Verizon relies on interconnection agreements with AT&T, BayRing, and Broadview in support of its Track A showing, and we find that these carriers serve more than a *de minimis* number of residential and business end users exclusively over their own facilities and represent an “actual commercial alternative” to Verizon in New Hampshire.⁶⁶ In Delaware, Verizon relies on an interconnection agreement with Cavalier in support of its Track A showing. We find that Cavalier serves more than a *de minimis* number of residential and business end users exclusively over its own facilities and represents an “actual commercial alternative” to Verizon in Delaware.

⁶² *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd 6237, 6257, para. 42; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 78.

⁶³ *Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549, 553-54 (D.C. Cir. 2001); *see also SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (“Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a ‘competing’ provider.”).

⁶⁴ The New Hampshire Commission concluded that “[Verizon] has interconnection agreements, processes, and procedures necessary for a competitive market to exist in New Hampshire and satisfies the preconditions for filing under Track ‘A’, Section 271 (c)(1)(A).” Verizon Application Appen. B, Tab 24, Letter from New Hampshire Commission – Public Utilities Commission Deliberation on Verizon 271 Application and Opinion Letter Regarding Verizon NH’s Compliance With the Requirements of Section 271 of the Federal Telecommunications Act of 1996 at 2 (March 1, 2002).

⁶⁵ In Delaware, the Hearing Examiner found that “[t]he evidence here is undisputed that CLECs are serving both residential and business customers at greater than *de minimis* levels and, in fact, greater than or equal to what existed in those smaller states where RBOCs have already received 271 approval from the FCC.” The Hearing Examiner accordingly concluded that Verizon “has made an adequate showing of compliance with Track A requirements.” *See* Verizon Application Appen. B, Tab 15, Inquiry Into Verizon Delaware, Inc.’s Compliance with the Conditions Set Forth in 47 U.S.C. § 271(c), Findings and Recommendations of the Hearing Examiner, Docket No. 02-001, para. 17 (Delaware Commission June 3, 2002) (Delaware Hearing Examiner Report).

⁶⁶ Destek, however, expresses concern regarding the general state of competition in New Hampshire. Destek contends that there is insufficient competition in New Hampshire and has participated in state proceedings proposing several steps regarding Verizon that, in Destek’s opinion, would further competition. These steps include structural separations, undergoing a state rate earnings review, and making specific state circuit tariff modifications. Destek Reply, Attach. 1 at 1-2. We find that these proposed measures are best suited for the state commission to address. Additionally, BayRing raises certain issues concerning interconnection agreements with Verizon in New Hampshire that, apparently, were settled prior to filing of the joint application before the Commission. BayRing Comments at 71-76, 81-83; Letter from Eric J. Branfman, counsel to BayRing, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 02-157 (filed June 27, 2002) (BayRing Public Interest *Ex Parte* Letter) at 2. Consequently, we do not find these matters to be relevant here.

21. We reject Cavalier's claim that a business decision to potentially cease marketing its services in Delaware would undercut a finding that Track A requirements have been satisfied in Delaware.⁶⁷ Cavalier alleges that Verizon refuses to provide compensation for Verizon-originated traffic that Cavalier carries from the physical interconnection point to Cavalier's switch and that, without payment from Verizon, Cavalier may be "forced to scale back its sales activity."⁶⁸ As the Commission has found in past applications, we disagree that a competing provider must necessarily be accepting new customers in order for a BOC to qualify for Track A, because we believe it would be unfair and inconsistent with the statute to foreclose a BOC's application under section 271 based on the marketing decision of an established competitive provider.⁶⁹ Nor do we believe that a section 271 proceeding is the appropriate forum to resolve such intercarrier disputes concerning issues that our rules do not clearly address.

B. Checklist Item 2 – Unbundled Network Elements

22. Checklist item two of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.⁷⁰ Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."⁷¹ Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for network elements must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable profit.⁷² Pursuant to this statutory mandate, the Commission has determined that prices for unbundled network elements (UNEs) must be based on the total element long run incremental cost (TELRIC) of providing those elements.⁷³

⁶⁷ We note that Cavalier opposes Verizon's Track A showing, claiming that its position as the only UNE loop residential service provider in Delaware is in jeopardy due to an apparent contract dispute with Verizon. See Cavalier Comments at 16-18. We also discuss Cavalier's assertions under checklist item 1 (Interconnection). See section IV.A.1, *infra*.

⁶⁸ Cavalier Comments at 16-17.

⁶⁹ *SWBT Arkansas/Missouri Order*, 16 FCC Rcd 20719, 20778-79, para. 119.

⁷⁰ 47 U.S.C. § 271(c)(2)(B)(ii).

⁷¹ 47 U.S.C. § 251(c)(3).

⁷² 47 U.S.C. § 252(d)(1).

⁷³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1996) (*Local Competition Order*); 47 C.F.R. §§ 51.501-.515. The Supreme Court has recently upheld the Commission's forward-looking pricing methodology in determining the costs of UNEs. *Verizon v. FCC*, 122 S. Ct. at 1679.

23. In applying the Commission's TELRIC pricing principles in this application, we do not conduct a *de novo* review of a state's pricing determinations.⁷⁴ We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."⁷⁵ We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

24. The commenters in this proceeding raise numerous issues concerning UNE pricing in both New Hampshire and Delaware. Because the pricing issues raised in New Hampshire and Delaware are distinct, we address the issues raised in each state separately below.

1. Pricing of New Hampshire Unbundled Network Elements

a. Background

25. Verizon's New Hampshire UNE rates were established via three separate proceedings before the New Hampshire Commission.⁷⁶ The first proceeding was initiated to review the terms, conditions, and proposed UNE rates contained in a Statement of Generally Available Terms ("SGAT") filed with the New Hampshire Commission in July 1997.⁷⁷ In support of its SGAT, Verizon submitted pre-filed testimony in October 1997 and filed a cost study in December 1997.⁷⁸ In May 1998, the New Hampshire Commission Staff filed its own

⁷⁴ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted); *see also Sprint v. FCC*, 274 F.3d at 556 ("When the Commission adjudicates § 271 applications, it does not – and cannot – conduct *de novo* review of state rate-setting determinations. Instead, it makes a general assessment of compliance with TELRIC principles.").

⁷⁵ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55.

⁷⁶ In addition to UNE rates, these proceedings established rates for OSS and collocation, and addressed several non-cost issues.

⁷⁷ *Verizon Hickey/Garzillo/Anglin Decl.* at 4, para. 14. *See* New Hampshire Commission, *Bell Atlantic Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996*, Order Granting in Part and Denying in Part, Order No. 23,738, Docket DE 97-171 (rel. July 6, 2001) (*New Hampshire SGAT Order*). In an effort to avoid delaying the introduction of an SGAT tariff, the New Hampshire Commission ordered that the SGAT, as filed by Verizon, automatically take effect without approval pending review by the New Hampshire Commission in this docket. *New Hampshire SGAT Order* at 8. The New Hampshire Commission determined that the rates contained in the SGAT were to "be the equivalent of temporary rates" and indicated that a hearing would be held. Ultimately, no hearing was held, however, because the procedural order submitted by the parties did not include a provision for hearing on the temporary rates and because the New Hampshire Commission received no request to hold a hearing on these rates. *New Hampshire SGAT Order* at 8-9.

⁷⁸ *Verizon Hickey/Garzillo/Anglin Decl.* at 4, para. 15; *New Hampshire SGAT Order* at 9.

cost study -- the proprietary Telecom Model developed by an outside consulting firm, Ben Johnson Associates, Inc.⁷⁹ Shortly thereafter, Verizon and New Hampshire Commission Staff submitted a joint stipulation to the New Hampshire Commission concerning recurring cost issues.⁸⁰ The joint stipulation recommended that the New Hampshire Commission adopt the Telecom Model to establish loop rates and Verizon's SCIS Model to establish switching rates.⁸¹ The joint stipulation also recommended specific modifications to certain inputs used by these cost models and added a common cost factor of 15 percent to both the SCIS and Telecom Model results.⁸²

26. Verizon, AT&T, BayRing, New Hampshire Commission Staff, and Ben Johnson Associates filed testimony, and Verizon responded to over 900 data requests from these parties and others over the course of the proceeding.⁸³ The New Hampshire Commission conducted four days of hearings on non-recurring costs in May 1998, with an additional day of hearings in June 1998.⁸⁴ The New Hampshire Commission also held six days of hearings on recurring costs in September and October 1998.⁸⁵ At the close of the hearings, parties submitted briefs and additional materials consisting of formal decisions by other administrative and judicial authorities.⁸⁶

⁷⁹ Verizon Application at 58; Verizon Hickey/Garzillo/Anglin Decl. at 4, para. 15; *New Hampshire SGAT Order* at 9-10.

⁸⁰ Verizon Hickey/Garzillo/Anglin Decl. at 4-5, para. 17. A prior joint stipulation was submitted to the New Hampshire Commission in March 1998 addressing cost of capital, depreciation, and capital structure. Verizon Hickey/Garzillo/Anglin Decl. at para. 16. These agreed upon costs and inputs were not challenged in the SGAT proceeding. *New Hampshire SGAT Order* at 72. Recently, the New Hampshire Commission opened a new proceeding to consider cost of capital and other inputs used to calculate UNE rates established in the SGAT proceeding. See New Hampshire Commission, DT 02-011, Order of Notice at 1 (rel. June 18, 2002) (*New Hampshire Order of Notice*).

⁸¹ Verizon Application at 58; Verizon Hickey/Garzillo/Anglin Decl. at 4-5, para. 17. See also *New Hampshire SGAT Order* at 68-70 (discussing details of the joint stipulation). The stipulation also recommended that the New Hampshire Commission use the Verizon model to establish the costs associated with inter-office trunking facilities. Verizon Application at 58; Verizon Hickey/Garzillo/Anglin Decl. at 4-5, para. 17.

⁸² *New Hampshire SGAT Order* at 68.

⁸³ Verizon Hickey/Garzillo/Anglin Decl. at 5, para. 18.

⁸⁴ *Id.* at 5, para. 19.

⁸⁵ *Id.*

⁸⁶ *New Hampshire SGAT Order* at 10-11. Specifically, AT&T and the Office of Consumer Advocate submitted materials consisting of orders and reports issued by this Commission, the Ninth Circuit Court of Appeals, and the state public utilities commissions of Massachusetts, Vermont, New York, Rhode Island, Kansas, and Pennsylvania, as well as copies of testimony Verizon submitted to the state commissions in New York and Massachusetts. *Id.*

27. On July 6, 2001, the New Hampshire Commission issued an order in the SGAT proceeding addressing UNE rate issues.⁸⁷ In its order, the New Hampshire Commission stated that, in determining UNE costs, it employed a forward-looking economic cost methodology as set forth in the Act and as interpreted by the Eighth Circuit.⁸⁸ For recurring costs, the New Hampshire Commission adopted the recommendation of the joint stipulation to use the Telecom Model to determine loop costs and to use the SCIS model to determine switching costs.⁸⁹ For nonrecurring costs, the New Hampshire Commission adopted Verizon's cost study subject to certain input modifications.⁹⁰ The New Hampshire Commission ordered Verizon to file compliance tariffs within 45 days from the date of the order.⁹¹

28. Several parties filed motions for reconsideration of the SGAT order, claiming that, among other things, the order failed to comply with the TELRIC methodology.⁹² On November 21, 2001, the New Hampshire Commission issued an order addressing these motions.⁹³ The New Hampshire Commission stated that its determination of costing was firmly

⁸⁷ Verizon Application at 59; Verizon Hickey/Garzillo/Anglin Decl. at 5-6, para. 20.

⁸⁸ *New Hampshire SGAT Order* at 5. The New Hampshire Commission explained that, on remand, the Eighth Circuit had determined that this Commission's pricing methodology violated the Act by reflecting the costs of supplying a "hypothetical network." *Id.* The New Hampshire Commission went on to state that prices in this proceeding would be calculated to reflect "the [incumbent] LEC's actual incremental costs in the future to serve competitors with the [incumbent] LEC's network facilities, including whatever upgrades the [incumbent] LEC chooses to implement." *Id.*

⁸⁹ Verizon Application at 59; Verizon Hickey/Garzillo/Anglin Decl. at 5-6, para. 20. Although the New Hampshire Commission adopted the recommendation of the joint stipulation to use these cost models for certain UNEs, it also ordered certain modifications to the inputs used therein. *See generally New Hampshire SGAT Order* at 83-93. The New Hampshire Commission also adopted a common cost factor of 15 percent for all relevant recurring costs. *New Hampshire SGAT Order* at 93.

⁹⁰ Verizon Application at 59; Verizon Hickey/Garzillo/Anglin Decl. at 5-6, para. 20. Specifically, the New Hampshire Commission required Verizon to adjust its work time estimates to mitigate upward bias and to change several of the network assumptions to take into account the existing and reasonably foreseeable state of technology. *New Hampshire SGAT Order* at 59-61.

⁹¹ *New Hampshire SGAT Order* at 164. The UNE rates established in the SGAT order became effective July 6, 2001. Verizon Application at 59; Verizon Hickey/Garzillo/Anglin Decl. at 5-6, para. 20.

⁹² *See New Hampshire Commission, Bell Atlantic Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996, Order Addressing Motions for Reconsideration* at 3-5, Order No. 23,847, Docket DT 97-171 (rel. Nov. 21, 2001) (*New Hampshire SGAT Recon. Order*). Specifically, these parties argued that, because implementation of the Eighth Circuit's decision had been stayed, the New Hampshire Commission mistakenly applied the Eighth Circuit's interpretation of TELRIC rejecting a purely hypothetical network. *Id.* at 12.

⁹³ Verizon Application at 59 n.41; Verizon Hickey/Garzillo/Anglin Decl. at 6, para. 21. The New Hampshire Commission also issued a subsequent order on reconsideration addressing a petition filed by Verizon seeking reconsideration of certain collocation cost issues. *See New Hampshire Commission, Bell Atlantic Petition for Approval of Statement of Generally Available Terms Pursuant to the Telecommunications Act of 1996, Order* (continued....)

based on forward-looking costs as defined by the Act and concluded that its decision was "consistent with a sound TELRIC analysis."⁹⁴ With regard to specific UNE costs, the order did modify the fall-out rate included in the nonrecurring cost study and eliminated the requirement that Verizon remove building and land costs from feeder costs.⁹⁵ On May 3, 2002, Verizon filed a compliance SGAT that contained a collection of modifications submitted subsequent to the SGAT order, and the New Hampshire Commission approved this filing on June 26, 2002.⁹⁶

29. The second proceeding establishing Verizon's UNE rates in New Hampshire was initiated to consider a number of revisions to the SGAT made by Verizon to include additional UNEs identified by this Commission in its *UNE Remand Order* and *Line Sharing Order*.⁹⁷ On August 30, 2001, Verizon filed revised rates for these additional UNEs to reflect the inputs adopted by the New Hampshire Commission in its order dated July 6, 2001.⁹⁸ In an effort to expedite the review of these UNE rates, the New Hampshire Commission appointed a facilitator to oversee the proceeding and held a technical session on November 11, 2001.⁹⁹ The technical

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Addressing Motion for Reconsideration of Order No. 23,847, Order No. 23, 915, Docket DT 97-171 (rel. Feb. 4, 2002) (*New Hampshire SGAT Second Recon. Order*).

⁹⁴ *New Hampshire SGAT Recon. Order* at 12-13. The New Hampshire Commission explained that its determination of what constitutes TELRIC pricing has its foundation in section 252(d) of the Act and New Hampshire law, and that it looked primarily to section 252(d)(1) for guidance if this Commission's directive was capable of different interpretations. It stated that its determination of just and reasonable rates was based on (1) economic cost modeling, which is "an imprecise art that aspires to establish a zone of reasonableness rather than a single correct answer," and (2) a reasonable approach to modeling a forward-looking network, which "requires some relationship to the reality of the current network world." *Id.* at 13-14. In light of these two premises, the New Hampshire Commission concluded that the cost modeling in its SGAT order was not unreasonable and did not violate TELRIC principles. *Id.* at 14.

⁹⁵ *Id.* at 24, 53-54.

⁹⁶ Verizon Hickey/Garzillo/Anglin Decl. at 6-7, para. 22. The effective date for the revised rates was July 6, 2001. *New Hampshire SGAT Recon. Order* at 70. In its application, Verizon states that it will update its billing systems to reflect the new rates effective July 6, 2001, and will true-up the rates to account for any over- or under-payments made since that date. Verizon Hickey/Garzillo/Anglin Decl. at 6-7, para. 22.

⁹⁷ Verizon Application at 60; Verizon Hickey/Garzillo/Anglin Decl. at 7, para. 23. See *UNE Remand Order*, 15 FCC Rcd at 3696 and *Line Sharing Order*, 14 FCC Rcd at 20912. *USTA v. FCC*, 290 F.3d 415 (D. C. Cir. 2002), petition for rehearing and suggestion for rehearing en banc denied, Order, Nos. 00-1012 and 00-1015 (D.C. Circuit filed Sept. 4, 2002).

⁹⁸ Verizon Hickey/Garzillo/Anglin Decl. at 7, para. 23.

⁹⁹ New Hampshire Commission, *Verizon New Hampshire*, Order Approving in Part and Denying in Part Statement of Generally Available Terms and Conditions Additional Unbundled Network Elements at 2-3, Order No. 23,948, Docket DT 01-206 (rel. Apr. 12, 2002) (*New Hampshire UNE Remand Order*). See also Verizon Hickey/Garzillo/Anglin Decl. at 7, paras. 23-24. Verizon filed a motion for reconsideration of Order No. 23,948 and that motion was denied on June 13, 2002. Verizon Application at 60 n.42; Verizon Hickey/Garzillo/Anglin Decl. at 8, para. 27. See New Hampshire Commission, *Verizon New Hampshire UNE Remand Tariffs*, Order Denying Motion for Reconsideration, Rehearing, and/or Clarification at 19, Order No. 23,993, Docket DT 01-206 (rel. June 13, 2002). Verizon appealed certain portions of the New Hampshire Commission's order in DT 01-206 (continued....)

session was followed by several teleconferences between the parties and Verizon responded to approximately 170 discovery requests.¹⁰⁰ Parties submitted briefs on December 28, 2001, and a hearing was held on January 17, 2002.¹⁰¹ On April 12, 2002, the New Hampshire Commission issued an order adopting, with modifications, many of the facilitator's recommendations and ordered that the rates for these UNEs become effective on that date.¹⁰² The order also required Verizon to make a compliance filing, which was made on May 10, 2002.¹⁰³

30. The third proceeding establishing Verizon's UNE rates in New Hampshire began in August 2001, to evaluate Verizon's application for state authority to provide interLATA service in New Hampshire.¹⁰⁴ The New Hampshire Commission hired a facilitator "who conducted a thorough and comprehensive investigation of Verizon New Hampshire's compliance with the statutory requirements enumerated in Section 271(c) of the [Act]" including its compliance with checklist item two.¹⁰⁵ The facilitator held five days of evidentiary hearings and the New Hampshire Commission considered declarations, exhibits, briefs, comments and oral arguments submitted by the parties, New Hampshire Commission Staff, and

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the New Hampshire Supreme Court. New Hampshire Commission Comments at 6. Specifically, Verizon appealed, among other things, the New Hampshire Commission's requirement that it phase-out loop conditioning charges over a three-year period and the requirement that it provide access to its LFACS database at a per-transaction charge (called the "mechanized loop qualification rate"). Recently, the New Hampshire Commission and Verizon agreed to remand the issue of access to LFACS and the mechanized loop qualification rate back to the New Hampshire Commission for reconsideration. Per the request of New Hampshire Commission Staff, Verizon changed the rate structure for mechanized loop qualification from a per-transaction rate back to a recurring rate. *See generally* Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Aug. 16, 2002) (discussing the appeal of the *New Hampshire UNE Remand Order*). On August 2, 2002, Verizon filed revisions to its SGAT to re-establish the mechanized loop qualification rate as a recurring rate, to reflect a 36 percent reduction in labor costs, and to correct a math error discovered in the prior compliance filing. *See* Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Aug. 6, 2002) (attaching August 2 filing with the New Hampshire Commission). Verizon's challenge concerning loop conditioning remains pending before the New Hampshire Supreme Court.

¹⁰⁰ Verizon Hickey/Garzillo/Anglin Decl. at 7, para. 24.

¹⁰¹ Verizon Hickey/Garzillo/Anglin Decl. at 7, para. 25. After briefs had been filed, the facilitator issued a recommended decision. Parties and New Hampshire Commission Staff filed comments regarding the recommended decision and the facilitator modified the recommended decision "in light of those comments." *Id.*

¹⁰² Verizon Application at 60; Verizon Hickey/Garzillo/Anglin Decl. at 8, para. 26.

¹⁰³ Verizon Hickey/Garzillo/Anglin Decl. at 8, para. 26. Verizon made a further compliance filing concerning loop conditioning on July 26, 2002. Letter from Alan S. Cort, Director, Regulatory, Verizon, to Debra Howland, Executive Director and Secretary, New Hampshire Public Utilities Commission, DT 01-206, at 1 (filed Jul. 26, 2002).

¹⁰⁴ Verizon Application at 60; Verizon Hickey/Garzillo/Anglin Decl. at 8, para. 28.

¹⁰⁵ *See New Hampshire Commission March 1 Letter* at 1. *See also* New Hampshire Commission Comments at Appen. 3.

interested persons.¹⁰⁶ On March 1, 2002, the New Hampshire Commission issued an Opinion Letter stating its conclusion that Verizon had met the requirements of checklist items 3, 6, 7, 8, 9, 10, 12, 13 and 14.¹⁰⁷ In order to meet the remaining checklist items and find that approval of Verizon's application would be in the public interest, the New Hampshire Commission required that Verizon satisfy ten conditions detailed in the Opinion Letter.¹⁰⁸

31. On March 15, 2002, Verizon objected to four of the ten conditions, including conditions two and three, which required an "across the board" reduction of UNE rates and a revision to the unbundled local switching charge.¹⁰⁹ Finding some of Verizon's points reasonable, the New Hampshire Commission directed the New Hampshire Commission Staff and the parties to work together to develop "clarifications, modifications, or substitutions" in a way to better serve the interests of the parties and the public.¹¹⁰ On May 6, 2002, the New Hampshire Commission Staff filed a Report and Recommendation that contained alternative proposals for addressing the concerns underlying the conditions; however, the report failed to include any solution agreed upon by all the parties.¹¹¹ On June 5, 2002, Verizon filed a letter with the New Hampshire Commission summarizing its position concerning the original ten conditions and offered alternatives to conditions two and five. As an alternative to condition

¹⁰⁶ *New Hampshire Commission March 1 Letter* at 1. See also New Hampshire Commission Comments at 3-6 (discussing the procedural history of DT 01-151).

¹⁰⁷ *New Hampshire Commission March 1 Letter* at 2. See also New Hampshire Commission Comments at 12, n.11 (noting that, in the *New Hampshire Commission March 1 Letter*, checklist item 13 was inadvertently omitted from the list of requirements Verizon had satisfied).

¹⁰⁸ *New Hampshire Commission March 1 Letter* at 2-3; New Hampshire Commission Comments at 13-14. Of the ten original conditions required by the New Hampshire Commission, conditions two and three required UNE rate and/or rate structure revisions. Specifically, condition two required that Verizon recalculate the rates in its competitive LEC tariff (the SGAT) using an 8.42 percent overall cost of capital, based on Verizon's current debt to equity ratio, Verizon's current cost of debt, and 10 percent return on equity. *New Hampshire Commission March 1 Letter* at 2. In addition, condition two required Verizon to reduce all rates by 6.43 percent to account for merger and process re-engineering savings. *Id.* Condition three required Verizon to revise the competitive LEC tariff (the SGAT) to apply the unbundled local switching charge only once to a call that originates or terminates in the same switch. *Id.* at 3.

¹⁰⁹ See Letter from J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, to Thomas B. Getz, Chairman, State of New Hampshire Public Utilities Commission, DT 01-151 at 1-4 (filed Mar. 15, 2002). See also New Hampshire Commission Comments at Appen. 4. Because condition two would have required Verizon to re-calculate all rates in the SGAT using a lower cost of capital and to account for merger and re-engineering savings, that condition would have resulted in lower overall UNE rates.

¹¹⁰ Letter from Thomas B. Getz, Chairman, State of New Hampshire Public Utilities Commission, to J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, DT 01-151 at 2 (filed Apr. 10, 2002).

¹¹¹ See Letter from Thomas B. Getz, Chairman, State of New Hampshire Public Utilities Commission, to J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, DT 01-151 at 1 (filed June 14, 2002) (*New Hampshire Commission June 14 Letter*). See also New Hampshire Commission Comments at Appen. 2.

two, the June 5 letter proposed specific reductions to Verizon's loop, switching, transport, and Daily Usage File (DUF) rates.¹¹² Verizon reduced its usage-sensitive switching and transport UNE rates to a level that would pass the Commission's non-loop benchmark analysis to New York rates.¹¹³

32. On June 14, 2002, the New Hampshire Commission issued a second Opinion Letter in light of the entire record.¹¹⁴ The New Hampshire Commission approved Verizon's proposed specific rate reductions in satisfaction of condition two and eliminated condition three based on information that no double charging occurs when Verizon bills for both originating and terminating portions of calls within the same switch.¹¹⁵ Verizon modified its SGAT to reflect the reduced rates that same day¹¹⁶ and these rates became effective June 14, 2002.¹¹⁷

33. On June 18, 2002, the New Hampshire Commission issued an Order of Notice opening a new proceeding to determine whether recurring UNE rates should be modified to reflect cost inputs that may have changed since the record was closed in the SGAT proceeding.¹¹⁸ In particular, the New Hampshire Commission stated its intent to "examine whether

¹¹² See Letter from J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, to Thomas B. Getz, Chairman, State of New Hampshire Public Utilities Commission, DT 01-151 at 2 (filed June 5, 2002). In its letter dated June 5, 2002, Verizon agreed to: (1) reduce monthly rates for 2-wire and 4-wire analog loops in its "rural" density zone to \$25.00 and \$50.00, respectively; (2) reduce switching and transport rates by approximately 18 percent; (3) reduce all DS1 loop rates by 20 percent; and (4) reduce DUF rates by about 70 percent. Verizon Hickey/Garzillo/Anglin Decl. at 9, para. 29; see also Verizon Application at 60-61.

¹¹³ Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Aug. 26, 2002) (explaining that Verizon reduced its non-loop UNE rates in New Hampshire to a level that would meet a benchmark with the New York non-loop rates on an aggregate basis). Verizon also states that, in taking this approach to reducing its rates, it relied upon the fact that the Commission had repeatedly held that aggregate benchmarking of non-loop rates was appropriate and thus, found no reason to adjust the rates such that non-loop rates would benchmark to New York on an element-by-element basis. *Id.* at 1.

¹¹⁴ *New Hampshire Commission June 14 Letter* at 1.

¹¹⁵ *Id.* at 3.

¹¹⁶ Letter from J. Michael Hickey, President, Verizon New England Inc., d/b/a Verizon New Hampshire, to Debra A. Howland, Executive Director and Secretary, State of New Hampshire Public Utilities Commission at 1 (filed June 14, 2002).

¹¹⁷ See Letter from Debra A. Howland, Executive Director and Secretary, State of New Hampshire Public Utilities Commission, to J. Michael Hickey, President and CEO, Verizon New Hampshire, DT 01-151 at 1 (filed July 2, 2002) (*New Hampshire Commission July 2 Letter*). In its application, Verizon states that it "expects to implement the necessary changes to its billing systems shortly, and will true up any rates paid since that date." Verizon Hickey/Garzillo/Anglin Decl. at para. 29. On July 2, 2002, the New Hampshire Commission confirmed that Verizon's SGAT, as modified, complied with the Opinion Letter. *New Hampshire Commission July 2 Letter* at 1.

¹¹⁸ *New Hampshire Order of Notice* at 2.

recurring TELRIC rates should be modified to take into account a revised cost of capital and/or such other input variables which have changed since 1998.”¹¹⁹ The New Hampshire Commission directed interested parties to identify the input variables used to establish recurring UNE rates that should be addressed in the new proceeding.¹²⁰

b. Discussion

34. Based on the evidence in the record, we find that Verizon’s New Hampshire UNE rates are just, reasonable, and nondiscriminatory as required by section 251(c)(3), and are based on cost plus a reasonable profit as required by section 252(d)(1). Thus, Verizon’s New Hampshire UNE rates satisfy checklist item two. The New Hampshire Commission concluded that Verizon’s New Hampshire UNE rates satisfied the requirements of checklist item two.¹²¹ While we have not conducted a *de novo* review of the New Hampshire Commission’s pricing determinations, we have followed the urging of the Department of Justice that we look carefully at commenters’ complaints regarding New Hampshire UNE pricing.¹²² For the reasons stated below, substantial questions have been raised about whether Verizon’s New Hampshire UNE rates were adopted through a proceeding which correctly applied TELRIC principles in all instances. We have evaluated Verizon’s current New Hampshire UNE rates based upon our benchmark analysis comparing such rates to UNE rates in New York.¹²³ As discussed below, Verizon’s New Hampshire UNE rates pass our benchmark test, and therefore, satisfy the requirements of checklist item two.

(i) TELRIC Compliance

35. We have carefully considered the comments filed in this proceeding alleging that Verizon’s New Hampshire UNE rates are not TELRIC-compliant. As a general matter, AT&T and BayRing argue that, in establishing UNE rates, the New Hampshire Commission failed to apply the proper interpretation of the TELRIC methodology in its SGAT proceeding.¹²⁴ These commenters contend that the New Hampshire Commission failed to measure UNE costs based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC’s wire

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ New Hampshire Commission Comments at 18 (concluding that, with the modified conditions, all checklist items had been met).

¹²² Department of Justice Evaluation at 10.

¹²³ See *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20752, paras. 67-68 (concluding that where a state has not conducted a TELRIC rate proceeding, its rates may nonetheless be found to be TELRIC compliant if they pass our benchmark analysis).

¹²⁴ See AT&T Comments at 12-13; BayRing Comments at 18-20.

centers, as required by section 51.505(b)(1) of our rules.¹²⁵ In addition, AT&T and BayRing allege numerous specific TELRIC errors. For example, BayRing asserts that Verizon's cost of capital is outdated and inflated,¹²⁶ and that Verizon's New Hampshire UNE rates are inflated because they do not reflect merger savings resulting from the NYNEX and GTE mergers.¹²⁷ BayRing also contends that the loop cost model, the Telecom Model, overestimates the forward-looking cost of outside plant and, as evidence that Verizon's New Hampshire loop rates are excessive, provides a comparison of the loop rates to loop rates in other Verizon states.¹²⁸ According to BayRing, its comparison demonstrates that Verizon's New Hampshire loop rates are excessive, unreasonable, and not forward-looking.¹²⁹

36. AT&T contends that Verizon's New Hampshire switching rates are inflated by clear TELRIC errors. Specifically, AT&T argues that the New Hampshire Commission engaged in result-oriented ratemaking and, thus, never engaged in any examination of Verizon's costs.¹³⁰ AT&T further contends that Verizon's switching rates were established using outdated switch discount percentages¹³¹ and that the switching cost study modeled obsolete technology.¹³²

¹²⁵ See AT&T Comments at 12-13; BayRing Comments at 18 (arguing that the New Hampshire Commission wrongly applied the Eighth Circuit's holding in *Iowa Utilities Board v. FCC*, which was stayed and ultimately reversed by the Supreme Court). See 47 C.F.R. § 51.505(b)(1). See also AT&T Reply at 12-13.

¹²⁶ See BayRing Comments 13-16. Verizon disputes this claim, arguing that the current cost of capital does not adequately account for the risks Verizon is subject to in a competitive market or the added regulatory risk inherent in the TELRIC methodology. Verizon Reply at 17; Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed July 18, 2002) (attaching Letter from William P. Barr, Executive Vice President and General Counsel, Verizon, to the Honorable Michael Powell, Chairman, Federal Communications Commission at 2 (filed July 16, 2002)).

¹²⁷ See BayRing Comments at 16-18.

¹²⁸ BayRing Comments at 20, 22. BayRing notes that the loop cost model adopted by the New Hampshire Commission produced statewide average loop rates that were 17.8 percent higher than those resulting from Verizon's proposed cost model. *Id.* at 20.

¹²⁹ *Id.* at 22-23. In its comments, AT&T makes a general claim that Verizon's New Hampshire loop rates are inflated because they rely on outdated data and that Verizon's current loop rates do not reflect declining loop costs. AT&T Lieberman Decl. at 8-10, paras. 17, 19. First, we note that, regardless of this claim, Verizon's loop rates pass a benchmark comparison to Verizon's New York loop rates. Second, to the extent that AT&T believes that Verizon's loop rates are inflated by outdated cost data, we note that the New Hampshire Commission recently initiated a proceeding to consider updated cost inputs and we encourage AT&T to submit updated loop cost information in that proceeding. See *New Hampshire Order of Notice* at 2.

¹³⁰ See AT&T Comments at 14-16. AT&T argues that the New Hampshire Commission never determined whether Verizon's switching rates are TELRIC-compliant because, in some instances, the switching rates are the result of inputs that were stipulated to and not based on actual costs. AT&T Comments at 14; AT&T Comments, Tab C, Joint Declaration of Catherine E. Pitts and Michael R. Baranowski at 11, para. 16 (AT&T Pitts/Baranowski Decl.).

¹³¹ AT&T Comments at 15, 16-17. According to AT&T, to determine switching costs, Verizon used a 1995 version of its cost model to develop the switch investments in New Hampshire, which relied upon switch contract (continued....)

AT&T also challenges the common cost factor used to establish switching rates¹³³ Finally, AT&T claims that Verizon overstated its minute-of-use switching costs by overstating its peak capacity requirements.¹³⁴

37. Based on the record in this proceeding and a review of the underlying state proceedings, we have serious concerns as to whether the New Hampshire Commission applied the proper interpretation of the TELRIC methodology in its SGAT proceeding.¹³⁵ Indeed, there is evidence in the record that the New Hampshire Commission based its decision on an interpretation of TELRIC that is more consistent with that approved in the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, a decision that was reversed by the Supreme Court.¹³⁶

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prices for 1994 to determine the switch discount input for the cost model, even though more recent data was available at that time. *Id.* at 16; AT&T Pitts/Baranowski Decl. at 11, para. 16. There seems to be some confusion in AT&T's comments as to the exact age of the switch contract prices. On page 15 of its comments, AT&T states that the switch contracts covered switch purchases before 1992. Later, however, on page 16, AT&T states that Verizon used switch contract prices for 1994. AT&T Comments at 15, 16.

¹³² AT&T Comments at 17-18. AT&T alleges that Verizon's switching cost study models obsolete technology because it assumes that all digital loop carrier lines will be served via TR-008 SLC-96 technology instead of GR-303 technology. *Id.* at 17; AT&T Pitts/Baranowski Decl. at 12-13, paras. 18-19.

¹³³ AT&T Comments at 19. AT&T argues that there is no data or analysis to support the 15 percent joint and common cost factor contained in the stipulation reached between Verizon and New Hampshire Commission staff. *Id.*

¹³⁴ *Id.* at 21. AT&T contends that Verizon improperly calculates its switching cost by dividing by minutes associated with only 252 business days in a calendar year instead of 365 days per year. *Id.* In confronting the same issue, the New York commission approved 308 days. AT&T Pitts/Baranowski Decl. at 15, para. 23 n.17. AT&T states that 365 days is the appropriate number because the switch will be used all days of the year. AT&T Comments at 21. In our *Verizon New Jersey Order*, we determined that, in our view, provided that an incumbent LEC's methodology is reasonable and consistent, TELRIC does not by itself dictate the use of a particular number of days, whether 308, 251, or some other number. *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12295, para. 48 (2002) (*Verizon New Jersey Order*). See also, *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont*, Memorandum Opinion and Order, 17 FCC Rcd 7625, 7640-42, paras. 29-31 (2002) (*Verizon Vermont Order*). As was the case in New Jersey and Vermont, the record raises serious questions concerning Verizon's use of 252 days in conjunction with the other inputs in Verizon's model and how the rates are applied.

¹³⁵ We also have questions concerning some of the cost assumptions required by the New Hampshire Commission and there is evidence that some of the cost inputs adopted by the NH Commission to determine UNE rates were established via a stipulation between Verizon and NH Commission Staff, rather than through an examination of Verizon's costs. See, e.g., AT&T Comments at 14-16; BayRing Comments at 13-14.

¹³⁶ *NH SGAT Order* at 5-6, 57-59, 85-88. See *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *rev'd in part, Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1679 (2002). On reconsideration, the New Hampshire Commission explained that its determination of what constitutes TELRIC pricing has its foundation in section (continued...)

Specifically, we have concerns regarding the technology assumptions required by the NH Commission and Verizon's switching rate calculation, which is based on dividing switch costs by 252 days to derive a per-minute rate. We need not, however, address the merits of these arguments here. In its application, Verizon does not rely on the rates established by the New Hampshire Commission. Rather, Verizon relies on its reduced UNE rates to support its application and demonstrates that these rates pass a benchmark analysis.¹³⁷ As this Commission stated in prior 271 orders, the purpose of our benchmark analysis is to provide confidence that a rate, despite potential TELRIC errors, falls within the range that a reasonable application of TELRIC principles would produce.¹³⁸ Thus, even if the New Hampshire Commission failed to apply the proper TELRIC methodology in every respect, the fact that Verizon's New Hampshire UNE rates pass a benchmark comparison to rates that are TELRIC-compliant provides a basis for our finding that, despite these alleged errors, Verizon's reduced UNE rates fall within the range that a reasonable TELRIC-based rate proceeding would produce.

(ii) Benchmark Analysis

38. *Appropriate Benchmark State.* In its application, Verizon chooses to rely on a benchmark comparison of its UNE rates in New Hampshire to those in New York.¹³⁹ BayRing contends, however, that the most appropriate state for comparison purposes is Vermont because Verizon's operations in New Hampshire and Vermont are "vestiges of Verizon's New England Telephone operations" and because Vermont is much more similar geographically to New Hampshire than New York.¹⁴⁰ Comparing Verizon's New Hampshire loop rates to those in

(Continued from previous page)

252(d) of the Act and New Hampshire law, and that it looked primarily to section 252(d)(1) for guidance if this Commission's directive was capable of different interpretations. It stated that its determination of just and reasonable rates was based on (1) economic cost modeling, which is "an imprecise art that aspires to establish a zone of reasonableness rather than a single correct answer," and (2) a reasonable approach to modeling a forward-looking network, which "requires some relationship to the reality of the current network world." *NH SGAT Recon. Order* at 13-14. In light of these two premises, the New Hampshire Commission concluded that the cost modeling in its *SGAT Order* was not unreasonable and did not violate TELRIC principles. *NH SGAT Recon. Order* at 14.

¹³⁷ See Verizon Reply at 16 (arguing that, because the rates established by the New Hampshire Commission have been replaced by new rates that pass a benchmark, there is no need to address the claim that the New Hampshire Commission failed to adhere to TELRIC in its original proceeding).

¹³⁸ *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd 6276, para. 82; *Verizon New Jersey Order*, 17 FCC Rcd at 12295 at para. 49 (stating that when a state commission does not apply TELRIC principles or does so improperly, it will look to rates in other section 271-approved states to see if the applicant's rates nonetheless fall within a range that a reasonable TELRIC-based rate proceeding would produce).

¹³⁹ Verizon Hickey/Garzillo/Anglin Decl. at 20, para. 58.

¹⁴⁰ BayRing Comments at 23-24. BayRing also states that the two states share a common BOC, a similar rate structure, and that Verizon's Vermont UNE rates have been found to be TELRIC-compliant by this Commission. *Id.* See also BayRing Reply at 3.

Vermont, BayRing claims that Verizon's loop rates would not pass a benchmark comparison to Vermont loop rates.¹⁴¹

39. States have considerable flexibility in setting UNE rates and certain flaws in a cost study, by themselves, may not result in rates that are outside the reasonable range that correct application of TELRIC principles would produce.¹⁴² The Commission has stated that, when a state commission does not apply TELRIC principles or does so improperly (e.g., the state commission made a major methodological mistake or used an incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), then we will look to rates in other section 271-approved states to see if the rates nonetheless fall within the range that a reasonable TELRIC-based rate proceeding would produce.¹⁴³ In comparing the rates, the Commission has used its USF cost model to take into account the differences in the underlying costs between the applicant state and the comparison state.¹⁴⁴ To determine whether a comparison with a particular state is reasonable, the Commission will consider whether the two states have a common BOC; whether the two states have geographic similarities; whether the two states have similar, although not necessarily identical, rate structures for comparison purposes; and whether the Commission has already found the rates in the comparison state to be TELRIC-compliant.¹⁴⁵

40. Additionally, in conducting a benchmark analysis, we consider the reasonableness of loop and non-loop rates separately.¹⁴⁶ Where the Commission finds that the state commission correctly applied TELRIC principles for one category of rates, it will use a benchmark analysis to evaluate the rates of the other category. If, however, there are problems with the application

¹⁴¹ BayRing Comments at 24; BayRing Reply at 3.

¹⁴² *Verizon Rhode Island Order*, 17 FCC Rcd at 3319-20, para. 37.

¹⁴³ *Id.* at 3320, para. 38; see also *Verizon Pennsylvania Order*, 16 FCC Rcd at 17456-57, para. 63; see also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82. In the *Pennsylvania Order*, we found that several of the criteria should be treated as indicia of the reasonableness of the comparison. *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64.

¹⁴⁴ See *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988, 9000, para. 22 (2001) (*Verizon Massachusetts Order*); *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20746, para. 57; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 65; see also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277, para. 84.

¹⁴⁵ See *Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 38; *SWBT Arkansas/Missouri Order* 16 FCC Rcd at 20746, para. 56; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 63; *Verizon Massachusetts Order*, 16 FCC Rcd at 9002, para. 28; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82.

¹⁴⁶ See, e.g., *Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 40; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 67; *Verizon Massachusetts Order*, 16 FCC Rcd at 9000-02, paras. 23-27. Loop rates consist of charges for the local loop, and non-loop rates consist of charges for switching, signaling, and transport.

of TELRIC for both loop and non-loop rates, then the same benchmark state must be used for all rate comparisons to prevent an incumbent LEC from choosing for its comparisons the highest approved rates for both loop and non-loop UNEs.¹⁴⁷

41. We are not persuaded by BayRing's argument that Verizon should be required to benchmark to Vermont. The Commission has used New York as a benchmark state in a number of section 271 orders.¹⁴⁸ In its application, Verizon chooses to rely on a benchmark comparison to New York rates and BayRing does not demonstrate that New York is an inappropriate state for comparison purposes. Significantly, BayRing fails to present sufficient evidence that New York fails to meet the criteria set forth for determining whether a comparison to a particular state is reasonable. BayRing's primary contention is that Vermont is much more similar geographically to New Hampshire.¹⁴⁹

42. As we stated in the *SWBT Arkansas/Missouri Order*, the BOC need only show that the benchmark state's rates fall within the TELRIC range.¹⁵⁰ The standard is not whether a certain state is a better benchmark, but whether the state selected is a reasonable one.¹⁵¹ In meeting our test by comparing its New Hampshire rates to New York rates, Verizon has demonstrated that the New Hampshire rates fall within the reasonable TELRIC range.

43. Moreover, even assuming *arguendo* that Vermont is more similar geographically to New Hampshire, such a fact would not undermine a benchmark comparison to New York rates. The USF cost model, as we have stated in prior section 271 orders, is designed to account

¹⁴⁷ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 66; *SWBT Missouri/Arkansas Order* at para. 58.

¹⁴⁸ See, e.g., *Verizon Rhode Island Order*, 17 FCC Rcd at 3326, para. 53; *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02-61, Memorandum Opinion and Order, 17 FCC Rcd 11659, 11679, para. 32 (2002) (*Verizon Maine Order*); *Verizon New Jersey Order*, 17 FCC Rcd at 12296, para. 50.

¹⁴⁹ BayRing Comments at 23-24. BayRing observes that more than half the population of New York State is concentrated in the New York City metropolitan area and that no city in New Hampshire is similar to New York City. *Id.*

¹⁵⁰ *SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20746, para. 56.

¹⁵¹ See *id.* In our *Verizon Rhode Island Order*, we found that the New York rates are appropriate anchor rates for purposes of a benchmark comparison. *Verizon Rhode Island Order*, 17 FCC Rcd at 3326-27, para. 53. We note that the New York state commission recently completed a new rate proceeding and we have commended the New York state commission for the thoroughness of its recent rate docket. *Verizon New Jersey Order*, 17 FCC Rcd at 12296, para. 50; *Verizon Rhode Island Order*, 17 FCC Rcd at 3324-25, paras. 48-53. See New York PSC, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-1357, Order on Unbundled Network Element Rates (rel. Jan. 28, 2002) (*New York UNE Rate Order*). Moreover, as a general matter, competitive LECs support the use of New York rates in conducting a benchmark analysis. *Verizon Rhode Island Order*, 16 FCC Rcd at 3326, para. 53.

for relative cost differences between states based on, among other things, geographical differences.¹⁵² For this and the others reasons discussed above, as we have found in prior orders, a benchmark comparison with New York rates is a reasonable way to establish that Verizon's New Hampshire UNE rates are within the range that reasonable application of TELRIC principles would produce. Moreover, because TELRIC pricing may be within a range of rates, a failure to meet a benchmark comparison with Vermont would not establish that Verizon's New Hampshire loop rates are outside a TELRIC-based range.¹⁵³

44. *Benchmark Analysis.* Having determined above that the New York rates are appropriate rates for the benchmark comparison, we compare Verizon's New Hampshire loop rates to the New York loop rates using our benchmark analysis. Taking a weighted average of Verizon's rates in New Hampshire and New York, we find that Verizon's New Hampshire loop rates satisfy our benchmark analysis and the requirements of checklist item two.¹⁵⁴

45. We also conduct a benchmark analysis of Verizon's New Hampshire non-loop UNE rates.¹⁵⁵ As we discussed above, Verizon relies on a benchmark comparison of its UNE rates in New Hampshire to its UNE rates in New York, and we have determined that New York is an appropriate benchmark state for comparison purposes. In our benchmark analysis of Verizon's non-loop UNE prices, we compare (1) the percentage difference between its New

¹⁵² See *SWBT Kansas/Oklahoma*, 16 FCC Rcd at 6277, para. 84 and n.248.

¹⁵³ In further support of its claim that Verizon's New Hampshire UNE rates are not forward-looking, BayRing provides a comparison of Verizon's New Hampshire loop rates to loop rates in other Verizon states. BayRing Comments at 22. According to BayRing, its comparison demonstrates that Verizon's New Hampshire loop rates are excessive, unreasonable, and not forward-looking. *Id.* at 22-23. As we made clear in the *Verizon Vermont Order*, mere rate comparisons are insufficient to demonstrate a TELRIC violation because, among other reasons, they do not account for cost differences between states. See *Verizon Vermont Order*, 17 FCC Rcd at 7644, para. 35. Further, both the United States Court of Appeals for the District of Columbia Circuit and the Commission have recognized that the "application of TELRIC principles can result in different rates in different states." *AT&T Corp. v. FCC*, 220 F.3d 615, affirming *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244. Thus, the fact that Verizon's New Hampshire loop rates are higher than loop rates in other Verizon states does not prove that such rates are excessive, unreasonable and not forward-looking, as BayRing contends.

¹⁵⁴ Verizon's New Hampshire loop rates are 43.12 percent higher than New York loop rates. Comparing the weighted average costs, we find that the New Hampshire loop costs are 74.85 percent higher than the New York loop costs. Because the percentage difference between Verizon's New Hampshire loop rates and the New York loop rates does not exceed the percentage difference between Verizon's loop costs in New Hampshire and Verizon's loop costs in New York, we conclude that Verizon's New Hampshire loop rates satisfy our benchmark analysis.

¹⁵⁵ AT&T argues that the specific rate reductions made by Verizon in the state section 271 proceeding do not cure the TELRIC violations alleged by AT&T. AT&T Comments at 16. As discussed below, using a benchmark analysis to New York, we conclude that Verizon's non-loop rates fall within a reasonable TELRIC range. Thus, although Verizon's rate reductions may not "cure" a TELRIC violation, they give us confidence that Verizon's New Hampshire non-loop rates nonetheless fall within the range that a reasonable application of TELRIC principles would produce.

Hampshire and New York UNE-platform per-line per-month prices for non-loop rate elements collectively, and (2) the percentage difference between New Hampshire and New York per-line per-month costs for these non-loop elements collectively, based on the Synthesis Model.¹⁵⁶ For purposes of this comparison, UNE-platform non-loop rate elements are line port, end office switch usage, common transport (including tandem switching), and signaling.¹⁵⁷ We develop per-line per-month prices for these elements for New Hampshire and New York separately by multiplying the state-approved “rates” by per-line demand estimates. State-approved rates for end office switching and transport are imposed on a MOU basis. We develop the per-line per-month overall demand for these usage-sensitive rate elements for New Hampshire and New York separately by first dividing total state-specific switched access lines into state-specific total annual MOU, based on dial equipment minutes (DEM), divided by 12 months. We then apply to each of the usage sensitive rate elements a percentage of this overall demand that is based on state-specific traffic assumptions supplied by Verizon regarding originating versus terminating, local intra-switch versus inter-switch, and tandem-routed versus direct-routed MOU.¹⁵⁸

46. AT&T argues that the alleged TELRIC errors raised in this proceeding cannot be surmounted by means of a benchmark analysis to non-loop rates in New York.¹⁵⁹ According to AT&T, it is not appropriate to use the Synthesis Cost Model to make cost-adjusted state-to-state comparisons of non-loop rates in rural states because that model substantially overstates non-loop costs in rural states relative to less rural states.¹⁶⁰ AT&T concludes that, as a result, any comparison substantially overstates any such cost justification for non-loop rate differences.¹⁶¹ Specifically, AT&T argues that the Synthesis Model overstates these non-loop cost differences for transport and for tandem switching and, thus, any switching-related benchmark analysis should, at the very least, exclude these costs.¹⁶² Using its own analysis, AT&T concludes that

¹⁵⁶ We adjust the costs derived from the Synthesis Model to make them comparable to UNE-platform costs. See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 65 n.249.

¹⁵⁷ We also note that Verizon’s New York non-loop rates contain both a digital and an analog port rate. For purposes of our benchmark analysis, we have used Verizon’s New York digital port rate of \$2.57, rather than the analog port rate of \$4.22, or any blend of the two rates. The New York rate structure uses the digital port rate of \$2.57 as the rate charged for ports that are purchased as part of the UNE-platform.

¹⁵⁸ See *Verizon Hickey/Garzillo/Anglin Decl.* at 21-22, paras. 60-62; Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed July 17, 2002) (*Verizon July 17 Ex Parte Letter*) (providing a revised time-of-day breakdown based upon STRAPS data).

¹⁵⁹ Comments of AT&T at 6-7.

¹⁶⁰ *Id.* at 6; AT&T Lieberman Decl. at para. 11. See also AT&T Reply at 3.

¹⁶¹ Comments of AT&T at 6; AT&T Lieberman Decl. at para. 11.

¹⁶² Comments of AT&T at 7; AT&T Lieberman Decl. at para. 14. See also David Levy, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 2 (filed Sept. 20, 2002) (*AT&T Sept. 20 Ex Parte Letter*).

Verizon's New Hampshire switching rates do not pass a benchmark comparison with New York's switching rates.¹⁶³ AT&T also argues that TELRIC rates are calculated on the basis of individual elements and that Verizon must show that the rates for *each* of its UNEs complies with TELRIC principles.¹⁶⁴ According to AT&T, because Verizon's switching rates cannot be justified based on a valid benchmark comparison, Verizon must prove that its New Hampshire switching rates are TELRIC-compliant using a stand-alone analysis of the underlying cost proceeding, which Verizon has failed to do.¹⁶⁵

47. For the reasons stated below, we do not agree with AT&T that we must reject a benchmark of New Hampshire non-loop rates against New York non-loop rates because of alleged flaws in the Synthesis Model. The Commission developed an extensive record through a rulemaking proceeding over several years to support its conclusion that the Synthesis Model accurately reflects the relative cost differences between states.¹⁶⁶ The differential produced by the cost model reflects variations in forward-looking costs based on objective criteria, such as density zones and geological conditions.¹⁶⁷ AT&T was an active participant in that rulemaking. Our Synthesis Model, like any model, may not be perfect. It is, however, the best tool we have for evaluating cost differences between states. In fact, in the context of universal service, AT&T has supported the Synthesis Model before the Commission and before the appellate courts.¹⁶⁸ Moreover, the transport portion of the Synthesis Model that AT&T criticizes is taken directly from the HAI cost model, the cost model that AT&T has championed in numerous states for ratemaking purposes, including New Hampshire.¹⁶⁹

¹⁶³ Comments of AT&T at 7; AT&T Lieberman Decl. at para. 15; AT&T Reply at 3.

¹⁶⁴ AT&T Comments at 7; AT&T Lieberman Decl. at 7, para. 16; AT&T Reply at 3, 4-5. In support of its argument that the Commission must look at the rates for each individual elements, AT&T cites to section 252(d)(1), which states that a BOC's rates for a network element comply with checklist item two only if they are "based on the cost . . . of providing . . . the network element." AT&T Comments at 7 (citing 47 U.S.C. § 252 (d)(1)); (emphasis in AT&T Comments). See also AT&T Sept. 20 *Ex Parte* Letter at 1.

¹⁶⁵ AT&T Comments at 7-8.

¹⁶⁶ See *SWBT Kansas/Oklahoma*, 16 FCC Rcd at 6277, para. 84; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20455-56, paras. 41-42 (1999), *aff'd in part and rev'd in part on other grounds*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

¹⁶⁷ See *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45 and 97-160, Tenth Report and Order, 14 FCC Rcd 20156, 20170, para. 30 (1999), *aff'd*, *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

¹⁶⁸ See Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 2 (filed Aug. 6, 2002) (citing *Qwest Corp. v. FCC*, 258 F.3d 1191, 1206 (10th Cir. 2001)) (Verizon Aug. 6 *Ex Parte* Letter).

¹⁶⁹ *Id.* at 4.

48. We reject AT&T's contention that the relief it seeks is limited and would not compromise the ability of the Commission to rely on the Synthesis Model in other contexts.¹⁷⁰ The relief sought by AT&T would only be necessary upon a finding that the Synthesis Model does not in all instances accurately reflect cost differences. Given that the Synthesis Model is designed to account for relative cost differences between states for the purpose of apportioning universal service support, we are not persuaded by AT&T's attempt to downplay the potential implications of the conclusion inherent in the relief sought, especially since such a conclusion would have industry-wide significance beyond the section 271 application process.

49. A re-examination of the Synthesis Model is an immensely complicated inquiry not suited to the section 271 process. We could not consider AT&T's argument in isolation as we would have to consider other arguments concerning the accuracy of the Synthesis Model, including those raised by Verizon that the Synthesis Model understates switching costs in rural states.¹⁷¹ Given its complexity, breadth and industry-wide significance, such an inquiry is simply not feasible within the 90-day review period required by Congress.¹⁷² As the Commission made clear in the *SWBT Texas Order*, Congress designed section 271 proceedings as "highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular [s]tate at a particular time. Such fast-track, narrowly focused adjudications . . . are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability."¹⁷³ Clearly, any conclusion concerning the ability of the Synthesis Model accurately to account for cost differences between states would have industry-

¹⁷⁰ AT&T Reply at 9; AT&T Reply, Declaration of Michael R. Lieberman and Brian F. Pitkin at 10-11, para. 23 (AT&T Lieberman/ Pitkin Reply Decl.). Verizon argues that, if AT&T's contentions regarding the Synthesis Model are correct, the Synthesis Model could not "validly be used to measure the relative cost differences across states for allocating universal service support . . ." Verizon Aug. 6 *Ex Parte* Letter at 2. AT&T responded that "[c]onsidering the switching-only benchmark analysis offered by AT&T . . . does not require the Commission to resolve broader issues such as the continued appropriateness of using the Synthesis Model 'to determine relative cost levels for universal service, benchmarking, or any other purpose.'" AT&T Lieberman/Pitkin Reply Decl. at 10-11, para. 23.

¹⁷¹ See Verizon Aug. 6 *Ex Parte* Letter at 3; Verizon Reply at 15-16. Cf. Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 10-11 (filed Sept. 3, 2002) (referencing a quote by the Rural Task Force that the Synthesis Model underestimates central office switching investment and operations expenses for carriers serving rural areas) (Verizon Sept. 3 *Ex Parte* Letter). But cf. Letter from David M. Levy, counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 3 (filed Sept. 5, 2002) (explaining that the focus of the quote by the Rural Task Force referenced by Verizon was on rural carriers, not the rural operations of Verizon and other BOCs) (AT&T Sept. 5 *Ex Parte* Letter). See also AT&T Sept. 20 *Ex Parte* Letter at 3 (addressing further Verizon's claim that the Synthesis Model tends to understate switching costs in rural areas) and Verizon Sept. 20 *Ex Parte* Letter at 7-8 (responding further to AT&T Sept. 5 *Ex Parte* Letter).

¹⁷² Indeed, an evaluation of AT&T's criticisms alone would be a complicated endeavor. See Verizon Aug. 6 *Ex Parte* Letter at 2-4. See also Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 6 (filed Sept. 20, 2002) (Verizon Sept. 20 *Ex Parte* Letter).

¹⁷³ *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 25.

wide significance. Further, even if it were appropriate to consider these allegations here, AT&T failed to quantify the magnitude of the alleged flaws, so we would be unable to determine whether AT&T's criticisms would result in any significant change in rates. Accordingly, we decline to benchmark Verizon's New Hampshire switching rates separately based on a claim that the Synthesis Model fails to accurately reflect costs and, hence, cost differences.

50. Further, although we do not dispute the fact that TELRIC rates are calculated on the basis of individual elements, we find that conducting a benchmark analysis of non-loop elements together, as the Commission has done in all prior section 271 orders relying on a benchmark comparison, is consistent with our obligations under the Act. In adjudicating a section 271 application, the Commission's role is to perform a "general assessment of compliance with TELRIC principles."¹⁷⁴ Our benchmark analysis is a method of making the general assessment as to whether UNE rates fall within the range of rates that TELRIC principles would produce. We make only a general assessment of UNE rates in the context of a section 271 proceeding, as the Commission could not, as a practical matter, evaluate every single individual UNE rate relied upon in a section 271 proceeding within the 90-day timeframe. AT&T asks us to examine switching rates only, and makes its statutory arguments in that limited context. But, under AT&T's interpretation of the statute, the Commission may be required to evaluate individually every UNE rate relied upon in this proceeding. Given the large number of rates at issue in a section 271 proceeding¹⁷⁵ and the 90-day timeframe, we find that our interpretation of our obligation under the statute is a reasonable one.¹⁷⁶

51. Although AT&T cites to section 252(d)(1) in support of its current preferred version of the benchmark test, we note that section 271(c)(2)(B)(ii) defines our role in this proceeding. Under that subsection, we must decide whether a BOC provides access to network elements "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."¹⁷⁷ In so deciding, we must exercise our judgment within the context of the compressed 90-day deadline imposed by section 271.¹⁷⁸ Under section 271, our role is to make a generalized decision as to

¹⁷⁴ See *Sprint v. FCC*, 274 F.3d at 556; *AT&T Corp. v. FCC*, 220 F.3d at 615.

¹⁷⁵ For instance, in support of its New Hampshire 271 application, Verizon filed 38 pages of rate sheets containing numerous rates on each sheet. See *Verizon Hickey/Garzillo/Anglin Decl.* at Attach. 1.

¹⁷⁶ Indeed, some states do not have separate rate elements for some UNEs that other states have. For example, New York has a separate rate element for signaling and end office trunk ports; however, New Jersey and Delaware include these elements in the per-minute switching rate. See, e.g., *Verizon New Jersey Order*, 17 FCC Rcd at 12297, para. 52.

¹⁷⁷ 47 U.S.C. § 271(c)(2)(B)(ii).

¹⁷⁸ Cf. *AT&T Corp. v. FCC*, 220 F.3d at 621-23.

whether network elements are available in accordance with section 252(d)(1). This is not, and cannot be, a *de novo* review of state-rate setting proceedings.¹⁷⁹

52. In addition, we do not believe that the statutory language supports AT&T's view that section 252(d)(1) clearly requires us to evaluate individually the checklist compliance of each of more than 150 UNE rates on an element-by-element basis. AT&T argues that, because section 252(d)(1) refers to the term "network element" in the singular, a BOC can comply with checklist item two of section 271 only if it shows "that the rates for each of its network elements--including switching--complies [sic] with TELRIC principles."¹⁸⁰ The relevant statutory provisions, however, do not refer to the term "network element" exclusively in the singular and, thus, we do not believe that the statute unambiguously requires this Commission to perform a separate evaluation of the rate for each network element in isolation. Section 252(d)(1) states, in relevant part, that "[d]eterminations by a State commission of ... the just and reasonable rate for *network elements* for purposes of [section 251(c)(3)] ... shall be based on the cost ... of providing the ... network element".¹⁸¹ In addition, section 271(c)(2)(B)(ii) requires a BOC to provide "[n]ondiscriminatory access to *network elements* in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."¹⁸² Notably, AT&T's own proposed method of benchmarking is inconsistent with its argument that the text of the Act *requires* evaluating each element in isolation. Specifically, AT&T argues that the Commission should separately compare three categories of elements: loops, non-loop, and switching.¹⁸³ Yet these categories--like the Commission's approach -- entail aggregating distinct elements for benchmarking purposes; for example, AT&T's "switching" category includes costs associated with signaling,¹⁸⁴ and the "non-loop" category includes costs associated with tandem switching and shared transport.¹⁸⁵ Thus, AT&T effectively concedes that *some* degree of aggregation is appropriate in conducting a benchmarking analysis; it simply disagrees about the optimum level of aggregation. For the reasons set forth here and in our prior orders, we construe the statute to permit a BOC to show that it complies with checklist item two based on a benchmark analysis of non-loop elements in the aggregate.

¹⁷⁹ *Sprint v. FCC*, 274 F.3d at 556. Our role is not to set UNE rates but, rather, to make a general assessment as to whether the rates set by the state comply with the statute.

¹⁸⁰ AT&T Comments at 7.

¹⁸¹ 47 U.S.C. § 252(d)(1) (emphasis added).

¹⁸² 47 U.S.C. § 271(c)(2)(B)(ii) (emphasis added).

¹⁸³ See AT&T Sept. 20 *Ex Parte* Letter at 2 (stating that AT&T is proposing to add *one* additional benchmark analysis to the two already recognized by the Commission) (emphasis in original).

¹⁸⁴ AT&T Lieberman Decl. at 6, para. 14. See also AT&T Sept. 20 *Ex Parte* Letter at 2 (stating that AT&T's benchmark analysis of Verizon's switching prices includes the rates and costs "of *all* the other nonloop elements that arguably have costs in common with switching") (emphasis in original).

¹⁸⁵ See *supra* discussion on "non-loop" elements at section III.B.1.b.ii.

53. Our long-standing practice of benchmarking non-loop rates in the aggregate is a reasonable exercise of our judgment in making the general assessment of whether rates fall within the reasonable range that application of TELRIC principles would produce.¹⁸⁶ The benchmark test as presently constituted reflects the practicalities of how UNEs are purchased and used. Because the transport and switching UNEs are, to our knowledge, not purchased separately in the Verizon states, for us to implement a UNE-by-UNE benchmark test for these elements would “promote form over substance, which, given the necessarily imprecise nature of setting TELRIC-based pricing, is wholly unnecessary.”¹⁸⁷ Our benchmark analysis allows us to conduct a competitively meaningful analysis based on the way UNEs are actually purchased, as discussed below, and we find that this approach is reasonable under the circumstances.

54. As noted above, as a practical matter, combining unbundled switching and unbundled transport for benchmarking purposes makes sense because competing LECs throughout Verizon’s territory invariably purchase them together.¹⁸⁸ Indeed, in the *UNE Remand Order*, the Commission acknowledged that “shared transport is technically inseparable from unbundled switching” and thus, requesting carriers did not have the option of using unbundled shared transport without also taking unbundled switching.¹⁸⁹ Although it is theoretically possible to take unbundled switching without taking unbundled transport in New Hampshire, it is uncontroverted in this record that competitive LECs have “never ordered switching without also ordering transport.”¹⁹⁰ According to Verizon, the same is true for the entire Verizon region.¹⁹¹ We are not convinced that considering switching in combination with transport “ignores the basic competitive policies that are implicit in any rational economic

¹⁸⁶ See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9001, para. 25; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 66; *Verizon New Jersey Order*, 17 FCC Rcd at 12296, para. 51. We note that the New Hampshire Commission relied on our non-loop benchmark precedent in approving Verizon’s proposed rate reductions.

¹⁸⁷ *Id.* at 561.

¹⁸⁸ Verizon Aug. 6 *Ex Parte* Letter at 5 (citing *Verizon Rhode Island Order*, 17 FCC Rcd at 3320-21, para. 40). Verizon suggests that analyzing these rates independently of one another is of no economic significance because competitive LECs have never ordered switching without ordering transport. *Id.* See also Verizon Sept. 20 *Ex Parte* Letter at 6-7.

¹⁸⁹ *UNE Remand Order*, 15 FCC Rcd at 3863, para. 371.

¹⁹⁰ Verizon Aug. 6 *Ex Parte* Letter at 5 (emphasis in original).

¹⁹¹ See Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 6 (filed Sept. 3, 2002) (stating that competitive LECs have not ordered switching and shared transport independently anywhere in Verizon’s region, and that AT&T itself is unable to identify a single instance where it or any other competitive LEC has done so). Verizon further notes that the Commission required that shared transport be offered as a UNE because it agreed with arguments made by competitive LECs, including AT&T, that it would be impracticable to order unbundled switching with dedicated transport purchased from the incumbent LEC or transport purchased from a competitive LEC, and that competitive LECs that purchased switching would, as a practical matter, require shared transport as well. *Id.* at 7.

interpretation of [s]ection 271,” as AT&T alleges.¹⁹² AT&T maintains that pricing these individual elements correctly may provide the proper incentives to purchase switching independently.¹⁹³ Nevertheless, AT&T failed to provide any evidence that it, or any other competitive LEC, orders switching separate from transport in any state with TELRIC-compliant UNE rates. Thus, we have no evidence that the relief sought by AT&T would effectuate a change in the way competitors purchase non-loop elements. In a prior 271 proceeding, AT&T presented its rate analysis in terms of the cost of “non-loop,” a recognition that this is, in fact, how the elements are purchased and, therefore, how they should be reviewed by the Commission.¹⁹⁴ Furthermore, benchmarking non-loop elements in the aggregate may be useful to help account for rate structure differences between states.¹⁹⁵ For these reasons, we decline here to disturb the Commission’s well-established precedent of combining non-loop elements for the purposes of conducting a benchmark comparison. Because we find that using a non-loop benchmark is reasonable, we need not consider whether Verizon passes a stand-alone switching benchmark comparison.¹⁹⁶

55. Having determined above that an aggregate non-loop benchmark is appropriate and that the New York rates are appropriate rates for the benchmark comparison, we compare Verizon’s New Hampshire non-loop rates to the New York non-loop rates using our benchmark analysis and find that Verizon’s New Hampshire non-loop rates satisfy our benchmark analysis.¹⁹⁷

¹⁹² AT&T Reply at 4; AT&T Lieberman/Pitkin Reply Decl. at 3, para. 5.

¹⁹³ AT&T Reply at 6-7; AT&T Lieberman/Pitkin Reply Decl. at 3-5, paras. 6-10. *See also* AT&T Sept. 20 *Ex Parte* Letter at 2.

¹⁹⁴ In the Verizon Massachusetts section 271 proceeding, the first proceeding where the Commission conducted a non-loop benchmark, AT&T presented the non-loop elements in the aggregate for comparison. *See Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, AT&T Comments at 20.

¹⁹⁵ *See Verizon New Jersey Order*, 17 FCC Rcd at 12297, para. 52 (stating that “aggregating per-minute switching with other non-loop rates such as port, signaling, and transport rates appropriately accounts for, among other things, rate structure differences between states”).

¹⁹⁶ *See Verizon Sept. 3 Ex Parte* Letter at 10-12; AT&T Sept. 5 *Ex Parte* Letter at 2-4; *see also AT&T v. FCC*, 220 F.3d at 628-30. Also, as we explain in paras. 47-49 *supra*, given the 90-day review period and narrow focus of section 271 authorization proceedings, issues concerning other uses of the Synthesis Model are more appropriately addressed in a proceeding where their implications industry-wide can be evaluated.

¹⁹⁷ Verizon’s New Hampshire non-loop rates are 11.5 percent higher than New York non-loop rates. Comparing the weighted average costs, we find that the New Hampshire non-loop costs are 17.67 percent higher than the New York non-loop costs. Because the percentage difference between Verizon’s New Hampshire non-loop rates and the New York non-loop rates does not exceed the percentage difference between Verizon’s non-loop costs in New Hampshire and Verizon’s non-loop costs in New York, we conclude that Verizon’s New Hampshire non-loop rates satisfy our benchmark analysis.

(iii) Temporary or Interim Rates

56. In its comments, BayRing claims that Verizon's New Hampshire UNE rates are not "final and permanent" because they include voluntary rate reductions and because a new proceeding was recently initiated to address UNE cost issues.¹⁹⁸ We first address BayRing's claim that the voluntary rate reductions proposed by Verizon and agreed to by the New Hampshire Commission in the state 271 proceeding result in rates that are not final or permanent.¹⁹⁹ In support of its claim, BayRing quotes a letter from the Chairman of the Telecommunications Oversight Committee of the New Hampshire legislature stating that Verizon agreed to these rates being "considered temporary in nature as the [state] commission may open a full rate investigation under RSA 378 immediately on receipt of FCC approval."²⁰⁰ This statement, which is not by the New Hampshire Commission, acknowledges that the rate reductions agreed to by Verizon may be altered in the future if the New Hampshire Commission initiates a new rate proceeding, which it has done. But this letter sets no limit on the effective term of the rates. These rates are currently in effect in Verizon's SGAT and are not now subject to any future true-up, and nothing in the June 14 Opinion Letter issued by the New Hampshire Commission in its section 271 proceeding suggests that the rate reductions made to comply with condition two are interim in any way. In its reply, Verizon confirms that these reduced rates were approved by the New Hampshire Commission as permanent rates.²⁰¹

57. Moreover, the fact that the New Hampshire Commission recently opened a new rate proceeding to update existing UNE cost inputs and rates does not by itself indicate that existing rates are temporary or interim. The Commission has recognized that rates may well evolve over time to reflect new information on cost study assumptions and changes in technology, engineering practices, or market conditions.²⁰² States review their rates periodically to reflect changes in costs and technology, and the Commission has found checklist compliance in several 271 proceedings where the state commission was engaged in, or about to initiate, a proceeding to revisit UNE rates.²⁰³ Nothing in the Act or our rules requires us to consider only

¹⁹⁸ BayRing Comments at 24. According to BayRing the rate reductions agreed to by Verizon are a "band-aid to Verizon's application that will be subject to possible removal once Verizon obtains [s]ection 271 authority." *Id.* at 25.

¹⁹⁹ BayRing Comments at 24-25.

²⁰⁰ *Id.* at 24.

²⁰¹ Verizon Hickey/Garzillo/Anglin Reply Decl. at 2, paras. 5-6.

²⁰² Bell Atlantic New York Order, 15 FCC Rcd at 4085-86, para. 247.

²⁰³ Verizon Hickey/Garzillo/Anglin Reply Decl. at 2, para. 6. See, e.g., *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9066, para 96 (2002) (*BellSouth Georgia/Louisiana Order*); *Verizon Rhode Island Order*, 17 FCC Rcd at 3317, para. 31; *Verizon Massachusetts Order*, 16 FCC Rcd 9005, para. 36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para 247.

section 271 applications containing rates approved within a specific period of time before the filing of the application itself. Such a requirement would not necessarily be relevant to whether an applicant's rates are TELRIC-based. Moreover, it would likely limit the ability of incumbent LECs to file their section 271 applications to specific windows of opportunity immediately after state commissions have approved new rates to ensure approval before the costs of inputs have changed. There is no indication that the Communications Act, which directs us to complete our section 271 review process within 90 days, was intended to burden the incumbent LECs, the states, or the Commission with the additional delays and uncertainties that would result from such a requirement. As the D.C. Circuit stated, "[i]f new [cost] information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change."²⁰⁴

58. BayRing also contends that "permanent" TELRIC-compliant rates should have been established before Verizon filed its application and that there is no evidence of present compliance with the statutory conditions for entry.²⁰⁵ According to BayRing, under Verizon's approach, a section 271 applicant need only "float the notion of a future rate proceeding as remedy to deficiencies in its rates."²⁰⁶ BayRing's argument here again is premised on the notion that some of Verizon's current New Hampshire UNE rates are temporary and that its permanent rates are not TELRIC-compliant.²⁰⁷ Above, we explain why Verizon's New Hampshire UNE rates are not temporary or interim, and also discuss the specific TELRIC violations alleged by the commenters and find that Verizon's reduced UNE rates fall within the range that a reasonable TELRIC-based rate proceeding would produce. Thus, we cannot agree with

²⁰⁴ *AT&T v. FCC*, 220 F.3d at 617.

²⁰⁵ BayRing Comments at 25. BayRing notes that the New Hampshire Commission has not yet formally approved Verizon's compliance filing in Docket DT 01-206 and that, at the time, Verizon had not yet made its compliance filing for loop conditioning. BayRing Comments at 25 n.82. On July 26, 2002, Verizon submitted its compliance filing for loop conditioning. See Letter from Alan S. Cort, Director, Regulatory, Verizon, to Debra Howland, Executive Director and Secretary, New Hampshire Public Utilities Commission, DT 01-206, at 1 (filed Jul. 26, 2002). On August 21, 2002, the New Hampshire Commission concluded that revisions to Verizon's SGAT "are in compliance with Order No. 23,948," the *UNE Remand Order*, and closed Docket No. DT 01-206. See Letter from Richard T. Ellis, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 (filed Sept. 4, 2002) (attaching Letter from Debra A. Howland, Executive Director and Secretary, New Hampshire Public Utilities Commission, to Michael J. Hickey, President and CEO, Verizon New Hampshire, DT 01-206, at 1 (filed Aug. 21, 2002)).

²⁰⁶ BayRing Comments at 26.

²⁰⁷ BayRing further states that the New Hampshire Commission "would not have asked Verizon to make across-the-board reductions in rates if it felt that its pricing methodology was truly in conformance with the [Commission]'s pricing principles. Verizon's failure to make these concessions means that it continues to remain in non-compliance." BayRing Comments at 26. As discussed above, because Verizon relies on a benchmark comparison to demonstrate that its rates fall within the reasonable range that correct application of TELRIC principles would produce, we need not address BayRing's contentions.

BayRing's statement that there is no evidence of present compliance with the statutory conditions for entry.

(iv) Switching Rate Structure

59. In addition to the other alleged TELRIC violations, AT&T argues that Verizon has inappropriately included 25 percent of the total switch investment, i.e., the "getting started costs" in the minute-of-use rate element.²⁰⁸ According to AT&T, these costs should be assigned to the fixed rate element because the processor utilization is such that traffic could continue to grow without exhausting the processor.²⁰⁹ AT&T claims that this misassignment will result in "severe cost over recovery as minutes grow and Verizon collects increased revenues, but its fixed costs remain static."²¹⁰

60. We have reviewed AT&T's claim that the switching cost allocation adopted by the New Hampshire Commission constitutes a TELRIC violation, and we conclude that the New Hampshire Commission did not commit any clear error by allowing Verizon to recover its "getting started costs" on a minute-of-use basis. In establishing prices, the state commissions retain the discretion to consider a variety of factors.²¹¹ The New Hampshire Commission concluded that our methodology "does not require that the 'getting started' costs be recovered in one fixed charge applied equally to each interconnecting [competitive] LEC, nor does it rule out the possibility of recovering such 'getting started' costs via a usage sensitive charge, including a charge based on minutes of use."²¹² We find that the New Hampshire Commission's determination that recovery of the "getting started" costs via a minute-of-use ("MOU") charge is consistent with TELRIC and the Commission's rules.

61. The processor is a shared facility and our rules explicitly grant states the discretion to recover the costs of shared facilities on a usage-sensitive basis. Specifically, the Commission's rules provide that the costs of dedicated facilities shall be recovered through flat-

²⁰⁸ AT&T Comments at 20; AT&T Pitts/Baranowski Decl. at 13-14, para. 20.

²⁰⁹ AT&T Comments at 20; AT&T Pitts/Baranowski Decl. at 13-14, para. 20.

²¹⁰ AT&T Comments at 20; AT&T Pitts/Baranowski Decl. at 13-14, para. 20. AT&T states that this misallocation is especially significant in New Hampshire because Verizon models its network with 100 percent Lucent switches and Verizon has misassigned the Lucent Equivalent POTS Half Calls. AT&T Pitts/Baranowski Decl. at 14, para. 21.

²¹¹ *Verizon Maine Order*, 17 FCC Rcd at 11676, para. 29; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6266, para. 59, *aff'd*, *Sprint v. FCC*, 274 F.3d at 556; *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244; *see also Local Competition First Report and Order*, 11 FCC Rcd at 15559, para. 114.

²¹² *New Hampshire SGAT Recon. Order* at 28-29. The New Hampshire Commission also found that AT&T failed to point to record evidence upon which that commission could implement the segregation of getting started costs and the fixed monthly per-switch recovery of such costs. *Id.* at 29.

rated charges²¹³ and that the costs of shared facilities shall be recovered through either usage-sensitive charges or flat-rated charges “if the state commission finds that such rates reasonably reflect the costs imposed by the various users.”²¹⁴ In the *Local Competition Order*, we recognized that it is appropriate to recover the costs of shared facilities from customers sharing the facility through either usage-sensitive or flat-rated charges.²¹⁵ The Commission’s rules also provide that local switching costs shall be recovered through a combination of a flat-rated charge for line ports, which are dedicated facilities, and one or more flat-rated or per-minute usage charges for the switching matrix and trunk port, which are shared facilities.²¹⁶ The Commission, declined, however, to prescribe the appropriate allocation of switching costs as between the line port, which must be flat-rated, and the switching matrix and trunk ports. Because the Commission did not prescribe a specific allocation, the states retain the flexibility to adopt an allocation within a reasonable range.²¹⁷ Because some portion of switching costs is fixed, an allocation of 100 percent of the switching costs to the MOU element would be unreasonable *per se*.²¹⁸ The New Hampshire Commission’s allocation of the “getting started” costs to the MOU element, however, is not unreasonable when considered in conjunction with other allocations it made to the fixed rate element.

(v) Dark Fiber Over Recovery

62. BayRing claims that Verizon double recovers capital costs through its loop and dark fiber charges because Verizon is recovering the same capital costs for loop fiber through its lit loop charges and dark fiber loop charges.²¹⁹ Similarly, BayRing contends that Verizon is recovering the same capital costs for interoffice fiber both through its interoffice transport charges and dark fiber transport charges.²²⁰ This argument was raised by competitive LECs in the state UNE remand proceeding. There, competitive LECs contended that, because dark fiber is provisioned out of spare lit fiber, loop and transport buyers are already currently paying for the spare fiber capacity because it was factored into the cost of lit fiber.²²¹

²¹³ 47 C.F.R. § 51.507(b).

²¹⁴ *Id.* § 51.507(c).

²¹⁵ *Local Competition Order*, 11 FCC Rcd at 15878, paras. 755, 757, 810.

²¹⁶ *Id.* at para. 810; 47 C.F.R. § 51.509(b).

²¹⁷ *Verizon Maine Order*, 17 FCC Rcd at 11676, para. 29.

²¹⁸ *Id.*

²¹⁹ BayRing Comments at 21.

²²⁰ *Id.*

²²¹ *New Hampshire UNE Remand Order* at 17.

63. We find that, with regard to transport charges, the New Hampshire Commission took reasonable steps to address the potential for over recovery as between lit and dark fiber. In the *New Hampshire UNE Remand Order*, after considering the potential for over recovery as between charges for lit and dark fiber, the New Hampshire Commission adopted a fill factor of 80 percent for inter-office fiber cable and for the central office FDF equipment.²²² In that proceeding, New Hampshire Commission Staff pointed out that a 100 percent fill factor would cause customers of lit fiber to pay a disproportionate amount for spare capacity.²²³ To address this concern, the New Hampshire Commission Staff recommended an 80 percent fill factor in the cost studies for both lit fiber and dark fiber.²²⁴ Further, the facilitator pointed out to the New Hampshire Commission that there are some capacity costs associated with the actual provisioning of dark fiber and thus, some amount of fill factor was appropriate.²²⁵ For these reasons, the New Hampshire Commission determined that an 80 percent fill factor for both lit and dark fiber was appropriate.²²⁶

64. We do not find the New Hampshire Commission's decision concerning transport charges to be clear error. Because the rates for lit fiber were established in the SGAT proceeding, which preceded the state UNE remand proceeding, the New Hampshire Commission was faced with the difficult task of establishing dark fiber loop and dark fiber transport rates after it had already established lit fiber rates in the SGAT proceeding, which were intended to fully recover Verizon's capital costs. There is no obvious reason why inter-office assets that are used to provide both lit and dark fiber should differ, e.g., the fiber in the ground and the central office FDF equipment are utilized to provide both lit and dark fiber. The New Hampshire Commission therefore reasonably required that costs for the same inter-office assets recovered in dark and lit fiber rates be based on the same fill factor. By adjusting the transport fill factor for both lit and dark fiber, the New Hampshire Commission attempted to address the potential for over recovery by Verizon and we conclude that this solution was reasonable under the circumstances.²²⁷

65. The same issue arises with regard to dark and lit fiber for loop facilities. The record indicates that, in considering the potential for over recovery as between lit and dark

²²² *Id.* at 20.

²²³ *Id.* at 17-18.

²²⁴ *Id.* at 18.

²²⁵ *Id.*

²²⁶ *Id.* at 19-20.

²²⁷ To the extent that BayRing believes that the transport cost studies have not been amended to reflect the correct fill factor, it would be appropriate to bring any alleged noncompliance to the attention of the New Hampshire Commission.

fiber, the New Hampshire Commission failed to address this issue for loop facilities.²²⁸ No party in that proceeding sought reconsideration of the New Hampshire Commission's decision or appealed the *New Hampshire UNE Remand Order* on this particular issue, and there is no evidence in the record that parties otherwise brought this oversight to the attention of the New Hampshire Commission.²²⁹ In response to questions raised in this proceeding, the New Hampshire Commission has recognized that this issue needs to be considered and has indicated that it "will investigate the issue further and address it if warranted."²³⁰ We find that, under the unique circumstances present here, this issue is best left to the state commission for resolution in the first instance. Above, we find that the New Hampshire Commission crafted a reasonable solution in the case of transport charges and we note that the New Hampshire Commission intends to address this issue in the near term. Because this issue remains open, the Commission will continue to monitor it post-approval. For these reasons, we find that this specific issue does not warrant a finding of checklist noncompliance.

66. For the foregoing reasons, we find that Verizon has demonstrated that its New Hampshire UNE rates satisfy the requirements of checklist item two.

2. Legislative Interference

67. Because we have independently determined that Verizon's UNE rates in New Hampshire satisfy checklist item two, we need not address parties' arguments that the New Hampshire Commission improperly approved Verizon's UNE rates based on undue "legislative interference."²³¹ Based on these alleged infirmities in the state process, BayRing and AT&T

²²⁸ See Letter from E. Barclay Jackson, Esq., Hearings Examiner, New Hampshire Public Utilities Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-157 at 1 (filed Sept. 4, 2002).

²²⁹ See *id.*

²³⁰ *Id.* at 2. Specifically, the New Hampshire Commission stated that "[n]ow that the [Commission] has raised this issue, [it] will investigate the issue further and address it if warranted." *Id.*

²³¹ See BayRing Comments at 5-11; AT&T Reply at 12-14; Desktel Reply Comments at Attachment 2. The gravamen of BayRing's argument is that in its June 14, 2002, letter approving Verizon's section 271 application, the New Hampshire Commission withdrew its March 1, 2002, pricing conditions based on legislative pressure brought to bear, in part, by a series of hearings before the New Hampshire legislature's Telecommunications Oversight Committee. Specifically, in its June 14, 2002, letter the New Hampshire Commission declined to adopt its original condition two, which would have resulted in a reduction in Verizon's loop rates in urban and suburban areas. *New Hampshire Commission June 14 Letter* at 3. BayRing primarily relies on *D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 92 S.Ct. 1290 (1972), in which the United States Circuit Court of Appeals for the District of Columbia stated that a federal agency's decision interpreting a statute would be invalid if based in whole or in part on extraneous considerations (i.e., threats to withhold appropriations) rather than the criteria established under the statute. We offer no opinion on the applicability of *Volpe* to the New Hampshire Commission's decision. Compare *Sierra Club v. Costle*, 657 F.2d 298, 409-410 (D.C. Cir. 1981) ("We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies [A]dministrative agencies are expected to balance Congressional pressure with pressures emanating from all other sources.").

contend that we should accord little weight to the New Hampshire Commission's June 14 letter, which approved Verizon's UNE rates.²³² We recognize that section 271 of the Act requires us to consult with the state commission to verify a BOC's compliance with the requirements for providing in-region interLATA services.²³³ Nevertheless, the Commission, using its discretion, must determine what weight to assign a state commission's consultation,²³⁴ and make a general assessment of compliance with all checklist items, including whether the applicant adheres to TELRIC principles.²³⁵ Therefore, in addition to considering the statement of the New Hampshire Commission, we conduct our own benchmark assessment of the reasonableness of Verizon's urban and suburban loop rates, based upon the complete record in this proceeding.²³⁶ Because our independent evaluation of Verizon's New Hampshire UNE rates satisfies us that these rates are within the range that reasonable application of TELRIC principles would produce, we need not reach parties' arguments concerning the appropriate weight to give the New Hampshire Commission's consultation on UNE rates.²³⁷

3. Pricing of Delaware Unbundled Network Elements

68. Our review of the adoption of UNE rates by the Delaware Public Service Commission (Delaware Commission) indicates that the Delaware Commission demonstrated a significant commitment to and understanding of TELRIC principles. We acknowledge the Delaware Commission's efforts to establish TELRIC-compliant rates based on the information available to it. In conducting our review, we have followed the recommendation of the Department of Justice that we carefully examine the comments criticizing Delaware UNE rates in determining whether Verizon's prices are cost-based.²³⁸ Our review indicates that Verizon's Delaware UNE rates are just, reasonable, and non-discriminatory in compliance with checklist item two.

²³² AT&T joins BayRing in alleging that the New Hampshire Commission's endorsement of Verizon's application resulted not from "reasoned conviction" but rather from Verizon's exercise of its "political muscle." AT&T Reply at 13.

²³³ 47 U.S.C. § 271(d)(2)(B).

²³⁴ *Bell Atlantic New York Order*, 15 FCC Rcd at 3962, para. 20.

²³⁵ See, e.g. *Verizon Maine Order*, 17 FCC Rcd at 11667-68, paras. 15-17; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55. See also *Sprint v. FCC*, 274 F.3d at 556 (When the Commission adjudicates § 271 applications, it . . . makes a general assessment of compliance with TELRIC principles.").

²³⁶ We discuss Verizon's New Hampshire loop prices at section III.B.1.b., *supra*.

²³⁷ We note that New Hampshire loop rates could have been approximately 22 percent higher and New Hampshire non-loop rates approximately 6 percent higher and still have passed a benchmark analysis to New York rates.

²³⁸ Department of Justice Evaluation at 7.

a. Background

69. The Delaware Commission established rates for UNEs in two phases over a four and one-half year period, from December 1996, until June 2002. Phase I began on December 16, 1996, with Verizon's filing of an SGAT setting forth proposed UNE rates, and ended with the adoption of recurring and non-recurring UNE rates on July 8, 1997.²³⁹ Seven competitive LECs or cable companies, including AT&T, WorldCom, Sprint, Connectiv Communications, Inc., (now Cavalier Telephone Mid-Atlantic, Inc.), as well as Delaware Commission staff and the Delaware Department of the Public Advocate, participated in the proceeding.²⁴⁰ The proceeding included four days of evidentiary hearings, direct testimony of 24 witnesses, rebuttal testimony from nine witnesses, and 93 exhibits.²⁴¹ The Delaware Commission-appointed Hearing Examiners issued a lengthy first report and two subsequent reports after two remands from the Delaware Commission.²⁴² The first remand required the Hearing Examiners to set actual rates based on the Delaware Commission's various determinations regarding the cost models and inputs to be used in determining Delaware UNE rates.²⁴³ In this first remand, the Delaware Commission required Verizon and AT&T to run their competing cost models using the Delaware Commission-mandated inputs, and compared the resulting rates in determining the appropriate, Delaware UNE rates.²⁴⁴ In the second remand, the Delaware Commission required the Hearing Examiners to further consider the question of whether Verizon recovered its OSS costs twice.²⁴⁵ All parties were provided an opportunity to file exceptions and present oral argument on all three hearing examiner reports.²⁴⁶

²³⁹ Delaware PSC, *Application of Bell Atlantic-Delaware, Inc. for approval of its Statement of Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996*, Order No. 4577, Docket No. 96-324 (rel. July 8, 1997) (*Phase I UNE Rate Order*).

²⁴⁰ *Phase I UNE Rate Order* at 4.

²⁴¹ *Id.* at 4-5.

²⁴² Delaware PSC, *Application of Bell Atlantic-Delaware, Inc. for approval of its Statement of Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996*, Findings and Recommendations of the Hearing Examiners (rel. Apr. 7, 1997); Findings and Recommendations of the Hearing Examiners on Remand from the Commission (rel. May 9, 1997); Findings and Recommendations of the Hearing Examiners on Further Remand from the Commission (rel. May 27, 1997).

²⁴³ Delaware PSC, *Application of Bell Atlantic-Delaware, Inc. for approval of its Statement of Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996*, Interlocutory Order No. 4488 at 5 (rel. Apr. 29, 1997).

²⁴⁴ *Id.* at 5-6.

²⁴⁵ Delaware PSC, *Application of Bell Atlantic-Delaware, Inc. for approval of its Statement of Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996*, Interlocutory Order No. 4508 at 3-4 (rel. May 27, 1997).

²⁴⁶ *Phase I UNE Rate Order* at 6-7.

70. At the conclusion of these lengthy Phase I proceedings, the Delaware Commission refused to adopt any specific cost model, but modified several inputs to the cost studies underlying Verizon's proposed recurring rates, including switching rates. The modified inputs adopted by the Delaware Commission are similar to inputs we have found to be TELRIC compliant in considering previous section 271 applications and are uncontested here. For example, the Delaware Commission adopted a cost of capital of 10.28 percent, FCC-prescribed depreciation rates, fill factors of 79 percent for copper feeder cable and 50 to 75 percent for distribution cable, and switch discounts based on an assumption that 90 percent of Verizon's new switch purchases would be complete replacements and 10 percent would be growth additions or add-ons.²⁴⁷ The Delaware Commission also accepted Verizon's calculation of per-minute switching rates, which divided total annual usage minutes by usage minutes on a combination of business and some weekend days per year to derive a per-minute rate.²⁴⁸ For non-recurring charges (NRCs), the Delaware Commission ordered its Hearing Examiners to reconsider Verizon's proposed NRCs in both remands, and, in accordance with their recommendation, ultimately adopted NRCs based on Verizon's non-recurring cost model.²⁴⁹ Finally, the Delaware Commission expressly adopted the TELRIC pricing standard, despite the fact that the standard's legality had not yet been finally determined by the Supreme Court.²⁵⁰

71. As permitted by section 252(e)(6) of the Telecommunications Act,²⁵¹ Verizon appealed the Delaware Commission's July 8, 1997 order to federal district court, challenging, in addition to other issues not relevant to this proceeding, the Delaware Commission's prescriptions regarding switch discounts, cost of capital, and depreciation rates. AT&T and Connectiv appealed the Delaware Commission's adoption of final NRCs, claiming that the NRCs failed to satisfy the TELRIC standard. In January 2000, the district court affirmed all of the Delaware Commission's determinations regarding Verizon's recurring rates and its adoption of those rates,

²⁴⁷ Inputs within these ranges have been approved in the following orders: *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9053, 9054-55 paras. 66, 69-71; *Verizon Rhode Island Order*, 17 FCC Rcd at 3317, para. 30; *Verizon New Jersey Order*, 17 FCC Rcd at 12293-94, paras. 42-44.

²⁴⁸ Verizon's conflicting practice of dividing total usage minutes by usage minutes on only 251 business days per year, rather than usage minutes on business and weekend days, has been hotly contested in other section 271 proceedings. In Vermont and New Jersey, Verizon divides total annual usage minutes by usage minutes on 251 business days per year to determine a per-minute switching rate. See *Verizon Vermont Order*, 17 FCC Rcd at 7640-42, paras. 29-31; *Verizon New Jersey Order*, 17 FCC Rcd at 12295, para. 48. In Delaware, in contrast, Verizon divides total annual usage minutes by usage minutes on 334.15 days (251 business days plus 83.15 weekend and holiday days) to derive per-minute switching rates. Verizon Application, Appen. A, Vol. 5, Tab G, Joint Declaration of Joshua W. Martin III, Patrick A. Garzillo, and Gary Sanford at 25, para. 65 (Verizon Martin/Garzillo/Sanford DE Decl.). This Delaware practice results in lower per-minute switching rates.

²⁴⁹ *Phase I UNE Rate Order* at 28.

²⁵⁰ *Id.* at 13. See also, *Verizon Communications, Inc. v. FCC*, *supra*.

²⁵¹ 47 U.S.C. § 252(e)(6).

referred to here as the Phase I rates, but remanded Verizon's NRCs for further evidentiary hearings to determine whether they complied with the TELRIC standard.²⁵²

72. On June 5, 2001, the Delaware Commission opened Phase II of its UNE rate proceeding to consider the following issues: (1) revised NRCs that Verizon filed in response to the district court's remand; (2) proposed rates for new UNEs required by the Commission's *UNE Remand Order*; and (3) "whether [the Phase I rates] need to be 'updated' in light of legal directives or other changed circumstances."²⁵³ On June 4, 2002, after once remanding Verizon's proposed NRCs to its Hearing Examiner for further evidence and consideration of the issue of whether Verizon's non-recurring cost model complied with the TELRIC standard and the district court's remand,²⁵⁴ the Delaware Commission adopted final NRCs.²⁵⁵ In adopting these NRCs, the Delaware Commission ordered significant adjustments to the inputs to Verizon's non-recurring cost model, and ordered changes to certain NRCs.²⁵⁶ Further, the Delaware Commission reduced Verizon's common cost factor from 10 percent to 5.95 percent and ordered Verizon to recalculate its Phase II rates using this new common cost factor.²⁵⁷ Finally, the Delaware Commission refused AT&T's request to update inputs to switching and other rates adopted in Phase I.²⁵⁸

73. On August 30, 2002, Verizon filed new, reduced switching rates with the Delaware Commission that compare much more closely to switching rates in other states where Verizon has received section 271 approval. These rates are now in effect.²⁵⁹ These rates, which

²⁵² *Bell Atlantic v. McMahon*, 80 F. Supp. 2d 218, 226, 236-242, 249-250 (D. Del. 2000).

²⁵³ Delaware PSC, *Application of Bell Atlantic-Delaware, Inc. for approval of its Statement of Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996, Phase II*, Order No. 5735 at 5-6, Docket No. 96-324, (rel. June 5, 2001) (*Phase II Announcement Order*).

²⁵⁴ Delaware PSC, *Application of Verizon Delaware Inc. (F/K/A Bell Atlantic-Delaware, Inc.), for approval of its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Phase II*, Order No. 5896, Docket No. 96-324 (rel. Feb. 19, 2002). The Delaware Commission also asked the Hearing Examiner to determine the appropriate amount of any non-recurring expedite premium and whether the common cost factor should be adjusted to reflect savings from the NYNEX and GTE mergers. *Id.*

²⁵⁵ Delaware PSC, *Application of Verizon Delaware Inc. (F/K/A Bell Atlantic-Delaware, Inc.), for approval of its Statement of Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Phase II*, Order No. 5967, Docket No. 96-324 (rel. June 4, 2002) (*Phase II UNE Rate Order*).

²⁵⁶ *Phase II UNE Rate Order* at 7, 32-35, 38-39, 37-38, 35-36.

²⁵⁷ *Id.* at 13.

²⁵⁸ *Id.* at 8-10.

²⁵⁹ Verizon Aug. 30, Sept. 9, Sept. 13 and Sept. 20 *Ex Parte* Letters. See also Delaware PSC (last visited Sept. 24, 2002) <http://www.state.de.us/delpsc/major/jac_8_30_ltr.pdf> (posting letter from Julia Conover, Vice President and General Counsel, Delaware, Verizon, to Karen Nickerson, Secretary, Delaware Public Service Commission, stating: "These new rates will be applicable to all [competitive] LECs operating in Delaware and shall remain in effect until the [Delaware] Commission otherwise modifies the rates.").

we refer to as Verizon's reduced switching rates, are the rates Verizon relies on in seeking section 271 approval in this proceeding, and our analysis is premised on the reduced rates being in effect. In addition, on August 12, 2002, Verizon filed a new feature change NRC of \$5.98, reduced from \$9.01, to correct its failure to comply with the Delaware Commission's order to use shorter work times for feature change tasks compiled by an independent consultant, rather than Verizon's internal, longer work time estimates.²⁶⁰

b. Delaware Switching Rates

74. AT&T and WorldCom attack Verizon's former Delaware switching rates on several grounds. While, notably, neither attack the Phase I proceeding on switching rates, both AT&T and WorldCom argue that the data underlying Verizon's switching rates is so old that the rates cannot be forward-looking or TELRIC compliant.²⁶¹ AT&T adds that one of the most significant inputs to Verizon's switching cost model, the discounts received on switch purchases, have become much deeper in the seven years since the Delaware UNE rate case began.²⁶² AT&T also points out that Verizon's Delaware switching rates were adopted before the NYNEX and GTE mergers, which generated large cost savings for Verizon that are not reflected in its rates.²⁶³ AT&T made these same claims to the Delaware Commission in the Phase II proceedings, but the Delaware Commission declined to reexamine the Phase I switching rates.²⁶⁴ AT&T contends that failing to update inputs to the switching cost model has a significant impact on UNE rate levels. To support this claim, AT&T provides two new analyses here that supplement the arguments it made to the Delaware Commission. One analysis indicates that Verizon experienced a 25 percent decline in switching investment on a per-minute-of-use basis between 1996 and 2001.²⁶⁵ A second analysis indicates that, due to possible errors in Verizon's inputs to the Switching Cost Investment System (SCIS) model used to determine switching costs, Verizon's Delaware switching rates allow it to over recover its switching investment by 126 percent.²⁶⁶ WorldCom adds that when the Delaware Commission reduced Verizon's common cost factor from 10 percent to 5.95 percent in Phase II of its UNE rate proceeding, it should have ordered Verizon to

²⁶⁰ Verizon Aug. 12 *Ex Parte* Letter.

²⁶¹ AT&T Comments at 9-11; AT&T Lieberman Decl. at 8; WorldCom Comments at 3; WorldCom Frentrup Decl. at 4, para. 7.

²⁶² AT&T Comments at 9; AT&T Pitts/Baranowski Decl. at 7-9, paras. 12-13.

²⁶³ AT&T Comments at 10.

²⁶⁴ *Id.* at 11. See also, *Phase II UNE Rate Order* at 8-10.

²⁶⁵ AT&T Lieberman Decl. at 8-9, paras. 17-19.

²⁶⁶ AT&T Comments at 8; AT&T Pitts/Baranowski Decl. at 3-5, paras. 6-8.

apply the reduced cost factor to all rates, including the Phase I switching rates, not just the Phase II NRCs and *UNE Remand* rates.²⁶⁷

75. Verizon's primary response to AT&T and WorldCom's evidence of changes in Verizon's costs is that, while AT&T and WorldCom made a similar argument in the Vermont section 271 proceeding, we nonetheless found Verizon's Vermont rates TELRIC-compliant, and should do the same here.²⁶⁸ With respect to AT&T's claims that the old rates do not reflect current, deeper switch discounts or merger savings, Verizon presents almost no information regarding newer discounts. Similarly, while Verizon suggests possible errors in AT&T's analyses showing a drop in switch investment per minute-of-use and over recovery of switch investment, it fails to fully address the issues raised by AT&T's analyses.²⁶⁹

76. In the absence of any substantive rebuttal of AT&T's argument, it appears that the inputs underlying the former, Phase I switching rates have undergone such significant changes as to cause us to question whether the switching rates set by the Delaware Commission can reasonably be held to be compliant with TELRIC principles. We need not decide this question here, because Verizon has responded to the attacks on its Phase I switching rates by reducing those rates.²⁷⁰ Accordingly, we consider Verizon's reduced switching rates using our benchmark analysis.

77. In further response to AT&T and WorldCom's attacks on Verizon's Phase I switching rates based on outdated data and unresolved questions generated by those attacks, Verizon filed new, reduced switching rates with the Delaware Commission on August 30, 2002.²⁷¹ These rates represent a 31 percent decrease from the Phase I switching rates.²⁷² Verizon now relies on these new, reduced switching rates to support this application, and asserts that these reduced rates cause its non-loop rates, which include switching rates, to satisfy a benchmark comparison to New York non-loop rates.²⁷³ As discussed at section II, *supra*, we

²⁶⁷ WorldCom Comments at 3; WorldCom Frentrup Decl. at 4, para. 8.

²⁶⁸ Verizon Reply at 23-24; Verizon Reply Appen. A, Tab D, Reply Declaration of Joshua W. Martin, III, Patrick A. Garzillo, and Gary Sanford at 3-4, paras. 6-8 (Verizon Martin/Garzillo/Sanford Reply Decl.).

²⁶⁹ Verizon Martin/Garzillo/Sanford Reply Decl. at 7-8, para. 15.

²⁷⁰ AT&T also makes the claim that Verizon's Delaware switching rates misallocate costs between the flat port rate and the usage sensitive per-minute switching rate. AT&T Comments at 11-12. This issue is identical to claims made with regard to New Hampshire switching rates, and we reject it with regard to Delaware on the same grounds. See section III.B.1.b.iv, *supra*.

²⁷¹ Verizon Aug. 30 *Ex Parte* Letter.

²⁷² *Id.*

²⁷³ *Id.*

waive our “complete when filed” rule to consider these reduced switching rates in this proceeding.

78. AT&T challenges Verizon’s reduced switching rates, claiming that, even with the 31 percent reduction, the rates are still too high to be TELRIC-compliant.²⁷⁴ To support this claim, AT&T points to lower switching usage rates recently adopted in New Jersey.²⁷⁵ As we have stated in prior section 271 orders, however, the mere fact of lower rates in another state, without further evidence, does not demonstrate that the state commission that adopted the challenged rates committed clear TELRIC error.²⁷⁶ Further, as the United States Court of Appeals for the District of Columbia Circuit has recognized and the Commission has concluded many times, “application of TELRIC principles can result in different rates in different states.”²⁷⁷

79. When there are questions about whether a state commission has properly conducted a TELRIC-compliant rate proceeding or has adopted rates without being able to conduct a full rate proceeding, we turn to our benchmark analysis to determine whether the rates nonetheless fall within a reasonable TELRIC range.²⁷⁸ We further find that New York is an appropriate anchor state for comparing Verizon’s Delaware rates.²⁷⁹ Applying the benchmark test using state-specific data, we find that Verizon’s Delaware non-loop rates are roughly 9.6 percent higher than New York non-loop rates, while Delaware weighted, average non-loop costs are roughly 10.6 percent higher than such costs in New York. Thus, Verizon’s Delaware non-loop rates, including its switching rates, pass our benchmark test.

80. We conclude, therefore, that Verizon’s reduced Delaware non-loop rates, including switching rates, fall within the range that reasonable application of TELRIC principles would produce and that Verizon’s reduced Delaware switching rates satisfy checklist item two.

²⁷⁴ AT&T Supplemental Comments at 3.

²⁷⁵ *Id.*

²⁷⁶ *Verizon Vermont Order*, 17 FCC Rcd at 7639, para. 26.

²⁷⁷ *AT&T Corp. v. FCC*, 220 F.3d at 615, *affirming Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244. See also, *Verizon Rhode Island Order*, 17 FCC Rcd at 3319-20, para. 37; *Verizon Vermont Order*, 17 FCC Rcd at 7639, para. 26; *Verizon New Jersey Order*, 17 FCC Rcd at 12295-96, para. 49, *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9034-35, paras. 24-25.

²⁷⁸ *Verizon Rhode Island Order*, 17 FCC Rcd at 3324, para. 24, 3327, para. 55; *BellSouth Georgia/Louisiana Order* at paras. 24-25; *Verizon Pennsylvania Order*, 16 FCC Rcd 17458-59, para. 67.

²⁷⁹ See *Verizon Rhode Island Order*, 17 FCC Rcd at 3327, para. 55; *Verizon Pennsylvania Order*, 16 FCC Rcd 17457, para. 64. See also our discussion of the appropriate anchor state for Verizon’s New Hampshire UNE rates at section III.B.1.b.ii, *supra*.

c. Delaware Loop Rates

81. Only AT&T criticizes Verizon's Delaware loop rates, again claiming that the outdated data underlying the rates causes them to fail to comply with our TELRIC standard.²⁸⁰ AT&T, however, points to no incorrect inputs, or particular loop costs that have declined since the Delaware Commission adopted the rates in 1997. Further, Verizon's Delaware loop rates compare favorably to New York loop rates based on our benchmark comparison. Delaware loop rates are only about three percent higher than New York loop rates, even though our USF model identifies a much higher cost differential between Delaware and New York loop costs.²⁸¹ Therefore, we conclude that Delaware loop rates fall within the range that reasonable application of TELRIC principles would produce.

d. Delaware Non-Recurring Charges

82. AT&T also attacks all of Verizon's Delaware NRCs, claiming that the model on which they are based is not TELRIC-compliant. Specifically, AT&T claims that Verizon's non-recurring cost model is based on existing, embedded processes rather than efficient, forward-looking technologies that are currently available, and, therefore, does not comply with the TELRIC standard.²⁸² AT&T points to Delaware Commission staff concerns regarding Verizon's procedures for surveying its employees to determine work times for tasks required to provision UNEs, its sampling and averaging methods, and its lack of documentation for calculating its forward looking adjustment to account for future improvements in UNE provisioning processes.²⁸³ AT&T further claims that Verizon's non-recurring cost model, and the NRCs it produced, fail to comply with a district court order remanding Verizon's NRCs to the Delaware Commission for further evidentiary hearings to determine whether they comply with the TELRIC standard.²⁸⁴ AT&T has appealed the NRCs most recently adopted by the Delaware Commission on June 4, 2002, to the same district court, claiming that the Delaware Commission failed to satisfy the court's mandate.²⁸⁵ AT&T further attacks specific Verizon NRCs for feature changes, field installation, disconnects, and hot cuts.²⁸⁶

²⁸⁰ AT&T Lieberman Decl. at 2, para. 3, 8-9, paras. 17-19.

²⁸¹ The differential between weighted, average loop costs in Delaware and New York is slightly more than 40 percent.

²⁸² AT&T Comments at 24; AT&T Walsh Decl. at para. 8.

²⁸³ AT&T Comments at 24-25; AT&T Walsh Decl. at para. 21. *See also Phase II UNE Rate Order* at 32.

²⁸⁴ AT&T Comments at 32.

²⁸⁵ Delaware Commission Comments at n.18; AT&T Comments at 32.

²⁸⁶ AT&T Comments at 22-36; AT&T Walsh Decl. at paras. 40-63. Verizon recently filed a new feature change charge of \$5.98, reduced from \$9.01, stating that, in calculating its previous rate, it had inadvertently failed to (continued....)

83. Before discussing AT&T's assertions, we provide additional detail regarding the Delaware Commission's adoption of NRCs. As stated in the background discussion, *supra*, after AT&T's successful federal district court challenge to the NRCs adopted by the Delaware Commission in Phase I of its UNE rate proceeding, the Delaware Commission instituted Phase II of its UNE rate proceeding to, among other tasks, adopt TELRIC-compliant NRCs.²⁸⁷ In this Phase II proceeding, AT&T, as it does here, challenged Verizon's non-recurring cost model, claiming that it satisfied neither the TELRIC standard nor the district court remand. In light of these claims, the Delaware Commission refused to adopt Verizon's non-recurring cost model, instead adopting significantly reduced NRCs more comparable to NRCs that had been recently adopted in New York and New Jersey. In making this decision, the Delaware Commission first quoted from its *Phase I UNE Rate Order*:

[I]t is not necessary for us to reach the issue of whether [Verizon's] cost study was conducted in conformance with TELRIC. Rather, we simply determine that the rates we are adopting, regardless of the cost study by which they were generated, appear to be within the range of just and reasonable TELRIC-based rates.²⁸⁸

The Delaware Commission then compared its decision to a similar decision by the New Jersey Board of Public Utilities (New Jersey Board):

Similarly, the New Jersey [Board] explained that data points and inputs were more important to it than its actual selection of a 'model,' and that therefore it had used Verizon's model but made 'suitable modification as necessary to ensure that the output from the study produces proper forward-looking results based upon TELRIC principles.' The Commission will do the same here.²⁸⁹

84. The Delaware Commission further mandated several significant adjustments to the inputs to Verizon's non-recurring cost model. First and most important, it ordered Verizon to recompute NRCs using newer and shorter work times for certain tasks resulting from an independent study, rather than Verizon's longer work times resulting from its own internal survey.²⁹⁰ Second, the Delaware Commission required Verizon to rerun its cost studies to
(Continued from previous page) _____
comply with the Delaware Commission's order to use the newer and shorter independent consultant work times. Verizon Aug. 12 *Ex Parte* Letter.

²⁸⁷ See section III.B.3.a., *supra*; *Phase II Announcement Order*.

²⁸⁸ *Phase II UNE Rate Order* at 32, citing *Phase I UNE Rate Order* at 14.

²⁸⁹ *Id.* at 33, citing New Jersey BPU, *Review of Unbundled Network Element Rates, Terms and Conditions of Bell-Atlantic New Jersey, Inc.*, No. TO 00060356, Opinion and Order at 158 (rel. March 6, 2002).

²⁹⁰ *Id.* at 34.